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No. A-990

IN THE

Supreme Court Of The United States

October Term, 1984

NELL HUNTER, et al, individually, and on behalf of all other members of Board of Registrars in the State of Alabama,
Appellants,

vs.

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Pursuant to Rules 12 and 15 of the Rules of the Supreme Court of the United States, Appellants, Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final judgment entered by the United States Court of Appeals for the Eleventh Circuit in this case and should exercise such jurisdiction herein.

QUESTIONS PRESENTED

I. Did the Court below err in holding that section 182 of the Alabama Constitution of 1901 violates on account of race the fourteenth amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary?

II. Did the Court below err in failing to recognize the jurisdiction and authority conferred upon the State of Alabama by the Tenth Amendment to the United States Constitution to administer its electoral process, including the conditions under which the right of suffrage may be exercised?

III. Did the Court below err in failing to recognize the authority and jurisdiction conferred upon the State of Alabama to disfranchise those convicted of crimes involving moral turpitude pursuant to the "affirmative sanction" language in Section 2 of the Fourteenth Amendment to the United States Constitution?

IV. Did the Court below err in failing to recognize that the State of Alabama has an interest in disfranchising persons who are convicted of crimes involving moral turpitude, regardless of whether or not the crime is a felony or a misdemeanor and regardless of whether or not the crime is punishable by imprisonment in the penitentiary?

V. Did the Court below err in failing to find that section 182 of the Constitution of Alabama of 1901 was not adopted with the intent, and has not had the effect, of disfranchising proportionately more blacks than whites or in the alternative that the appellants demonstrated the existence of a permissible motive which led to the same result, that is an enactment of section 182 of the Constitution of Alabama of 1901?

TABLE OF CONTENTS

	Page
Jurisdictional Statement	i
Questions Presented	ii
Table of Contents	iii
Table of Authorities	iii
Opinions Below	1
Grounds of Jurisdiction of Supreme Court	2
Constitutional Provisions Involved	2
Statement of the Case	4
Substantiality of Federal Questions	11
Conclusion	18
Certificate of Service	19
Affidavit of Service	21
Appendix	A-1

TABLE OF AUTHORITIES

Cases:	Page
Bradford Electric Light Co. v. Clapner, 284 US 221 (1931)	2
Chicago v. Atchison, T. & S.F.R. Co., 357 US 77 (1958)	2
Detroit v. Murray Corp., 355 US 489 (1958)	2
Dusch v. Davis, 387 US 112 (1967)	2
Kronlund v. Honstein, 327 F Supp. 71 (N.D. GA 1971)	15, 16
Kusper v. Pontikes, 414 U.S. 51 (1933)	12
Lassiter v. North Hampton County Board of Elections, 360 US 45 (1959)	12, 14
Mount Healthy City School District Board of Education v. Doyle, 429 US 274 (1977)	17

TABLE OF AUTHORITIES—Continued

Cases: *Page*

Oregon v. Mitchell, 400 US 112 (1970) 12, 13

Pope v. Williams, 93 US 622 (1904) 11

Richardson v. Ramirez, 418 US 24 (1934) 13, 14

Underwood v. Hunter, 604 F2d 367 (5th Cir. 1979) 1, 5

Underwood v. Hunter, 622 F2d 1042 (5th Cir 1980) 1, 5, 6

Underwood v. Hunter, 730 F2d 614 (11th Cir 1984) 1, 6

United Gas Pipe Line Co. v. Ideal Cement Co., 369 US 134 (1962) 2

Village of Arlington Heights v. Metropolitan Developing Corp., 429 US 252 (1977) 9

Washington v. State, 75 Ala 582 (1884) 16

Statutes:

28 USC 1254 (2) 2

Other Authorities:

First Amendment to the United States Constitution 15

Eighth Amendment to the United States Constitution 15

Tenth Amendment to the United States Constitution ..... ii, 3, 5, 11, 12, 13, 17

Fourteenth Amendment to the United States Constitution ..... ii, 2, 4, 5, 11, 12, 13, 14, 15, 17

Section 178 of the Alabama Constitution of 1901 ..... 9, 10

Section 180 of the Alabama Constitution of 1901 ..... 9, 10

Section 181 of the Alabama Constitution of 1901 10

Section 182 of the Alabama Constitution of 1901 ..... ii, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17

Section 194 of the Alabama Constitution of 1901 ..... 9, 10

Section 2-801 of the Georgia Constitution 15, 16

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit upon which this appeal is based appears in 730 F2d 614 (11th Cir. 1984) and is included in the Appendix, pp. A-1 to A-9.

The opinions of the United States Court of Appeals for the Fifth Circuit involving prior appeals and dispositions in this case appear in 604 F2d. 367 (5th Cir. 1979) and 622 F2d 1042 (5th Cir. 1980) and are included in the Appendix, pp. B-1 to B-4 and C-1.

The opinions from which the appellees eventually appealed to the United States Court of Appeals for the Eleventh Circuit and which were reversed by that Court are included in the Appendix, pp. D-1 to D-13 and E-1 to E-7.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action seeking to have declared unconstitutional on various grounds section 182 of the Alabama Constitution of 1901. The appellees succeeded in reversing the District Court and prevailing in the United States Court of Appeals for the Eleventh Circuit which held that section 182 of the Alabama Constitution of 1901 violates on account of race the Fourteenth Amendment to the United States Constitution with respect to those convicted of crimes not punishable by imprisonment in the penitentiary. The final judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 10, 1984. A timely notice of appeal was filed on July 2, 1984 in the United States Court of Appeals for the Eleventh Circuit. The jurisdiction of this Court is invoked under the provisions of 28 USC 1254 (2) in that a state constitutional provision was invalidated as repugnant to the United States Constitution, specifically the Fourteenth Amendment thereof.

Cases that sustain the jurisdiction of this Court include:

Detroit v. Murray Corp., 355 US 489 (1958)
Chicago v. Atchison, T. & S.F.R Co., 357 US 77 (1958)
United Gas Pipe Line Co. v. Ideal Cement Co., 369 US 134 (1962)
Dusch v. Davis, 387 US 112 (1967)
Bradford Electric Light Co. v. Clapper, 284 US 221 (1931)

CONSTITUTIONAL PROVISIONS INVOLVED

1. Sections 1 and 2 of the Fourteenth Amendment to the United States Constitution:

SECTION 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

SECTION 2

"Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

2. The Tenth Amendment to the United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. Section 182 of the Alabama Constitution of 1901:

"The following persons shall be disqualified both from registering, and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery,

bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector."

STATEMENT OF THE CASE

This case was initiated when the appellees filed a complaint seeking to have declared unconstitutional section 182 of the Alabama Constitution of 1901 insofar as it applied to offenses carrying a penalty of one year or less, that is crimes not punishable by imprisonment in the penitentiary, and to enjoin its further application and for a preliminary injunction to have them, and the class they represented, restored to the voting lists in their respective county or to be allowed to register to vote in their respective county. In response, the appellants filed a Motion to Dismiss which raised, among other things, the following:

a. That the State of Alabama had an interest in disfranchising individuals who are convicted of crimes involving moral turpitude pursuant to Section 182 of the Alabama Constitution of 1901, regardless of the length, kind or place of confinement, that not being the standard or condition which gave rise to this State interest.

b. That the State of Alabama had a compelling state interest or in the alternative a rational basis for disfranchising those persons convicted of crimes involving moral turpitude, regardless of the length of sentence.

c. That section 2 of the Fourteenth Amendment to the United States Constitution either expressly allowed or ex-

empted from the operation of section 1 of the Fourteenth Amendment disfranchising provisions of state law such as section 182 of the Constitution of Alabama of 1901 and conferred upon the State of Alabama the authority to disfranchise moral turpitude misdemeanants.

In later motions and pleadings, the appellants additionally asserted as defenses the right under the Tenth Amendment to the United States Constitution to determine the conditions under which the right of suffrage may be exercised and the right to constitutionally exclude from the franchise those persons convicted of crimes involving moral turpitude.

The District Court, after an evidentiary hearing, overruled appellees' request for injunctive relief and granted the appellants' Motion to Dismiss. On appeal, this decision was reversed on a procedural ground not in any way connected with the merits. *Underwood v. Hunter*, 604 F2d 367 (5th Cir. 1979) (See Appendix – B-1 – B-4).

Thereafter, appellees again filed a Motion for Preliminary Injunction in the District Court seeking similar relief to that originally requested. While pending, the appellees filed a Notice of Interlocutory Appeal with the Fifth Circuit and a Motion for Injunction Pending Appeal, again in an effort to gain the opportunity to vote in some upcoming elections. The Motion for Preliminary Injunction was denied by the District Court, the Motion for Injunction Pending Appeal was denied by the Fifth Circuit and the appeal was decided adversely to the Appellees as the Fifth Circuit opined that the District Court properly denied the latest attempt for injunctive relief because Appellees failed to demonstrate that any irreparable harm would result if the injunction was not granted. *Underwood v. Hunter*, 622 F2d, 1042 (5th Cir. 1980), a copy of which is included in the Appendix as C-1.[1]

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[1]The opinion in *Underwood vs Hunter*, 622 F2d 1042 (5th Cir. 1980), which is found in the Appendix hereto as C-1 contains an excellent recital of the procedural history of this case through that appeal.

Language espoused in dealing with the issues involved is found in the second opinion in *Hunter*, supra., and is as follows:

> "Plaintiffs (appellees herein) failed to meet the second element, a showing of irreparable harm. Although each had been disfranchised for conviction of a crime involving moral turpitude, an individual in Alabama can have his right to vote restored if pardoned. ALA CODE §12-14-15, See §17-3-5. Victor Underwood was purged from the voting list of Jefferson County on April 30, 1977 for conviction of issuing a worthless check two and one-half to three years prior to the July 19, 1978 hearing on the initial preliminary injunction. Although officials of the Jefferson County Board of Registrars informed Underwood of the procedure for having his voting rights restored, he has made no effort to comply, nor has he alleged any difficulty in complying with this procedure. Carmen Edwards was purged from the voting list of Montgomery County pursuant to her conviction for the crime of issuing a worthless check in May 1978. Although she attempted to receive a pardon, for purposes of restoration of her voting rights, from the Mayor of Montgomery, she was told that she must wait at least a year. She has not sought a pardon since the waiting period has elapsed.
>
> Neither plaintiff, then, has presented any evidence which indicates that a proper application for a pardon would not have been granted. Under these circumstances, we cannot find that granting a Motion for Preliminary Injunction is either necessary or appropriate. . . ."

Subsequently, appellants Motion for Summary Judgment on Appellees' first three causes of action was granted. After a hearing on the remaining cause of action, specifically the appellees' fourth cause of action which alleged that section 182 of the Alabama Constitution of 1901 was enacted with intent to deprive blacks the right to vote, the District Court denied appellees any relief and found in favor of the appellants. However, this decision was reversed as reflected in the decision of *Underwood v. Hunter* contained in Appendix A hereto, the judgment from which the appellants now appeal.

Appellees first three causes of action can be summarized as follows: That the misdemeanors listed in section 182 as disfranchising offenses unconstitutionally infringe upon the franchise because they deny the franchise without a compelling state interest, that the misdemeanors listed in section 182 as disfranchising offenses denied appellees equal protection of the laws because more serious offenses are not disabling and that disfranchisement for conviction of a "crime involving moral turpitude" is based on a definition that is vague and indefinite and denies plaintiffs the right to register and to vote. As stated, the appellants' Motion for Summary Judgement as to these three causes of action was granted and although made a basis of the appellees' appeal to the Eleventh Circuit, these causes of action were not discussed by the Court below as it reached its decision on the basis of the appellees fourth cause of action. The fourth cause of action alleged that the list contained in section 182 was specifically adopted because of its supposed disproportionate impact on blacks with the intent to disfranchise blacks, thereby abridging the right to vote on the basis of race. After a hearing on this particular cause of action, the District Court ruled in favor of the appellants but this decision was reversed by the Court below.[2]

Two hearings were conducted in this case. The first was held in July of 1978 and the testimony adduced at that hearing related mainly to the first three causes of action. The evidence at that hearing revealed the following:

Various lists prepared either by the local District Attorney or the State Attorney General were used by the appellants in determining whether a certain crime had been found to involve moral turpitude as well as lists prepared by these offices outlining which crimes disqualified one from voting pursuant to section 182 of the Alabama Constitution of 1901. Testimony

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[2]The opinion of the District Court granting the appellants' Motion for Summary Judgment on the first three causes of action is found in the Appendix at D-1 — D-13.

The opinion of the District Court which was reversed by the Court below is found in the Appendix at E-1 — E-7.

revealed specifically that the appellants had the use of an Attorney General of Alabama's opinion which specifically opined that the crime of issuing worthless checks was one involving moral turpitude and therefore disqualifying under section 182 of the Alabama Constitution of 1901, that crime being the one for which the named appellees were convicted. Further testimony revealed that if a crime was not in any of these lists, the local District Attorney's office or the Attorney General's office would be consulted to determine whether the crime was disqualifying.

Appellee Underwood, who is white, was purged from the voting list in Jefferson County, Alabama because of his conviction of the crime of issuing a worthless check. He had been convicted of this crime some two and one-half to three years prior to July of 1978 and had been purged from the voting list in May of 1977. To this date, he has not sought his statutory right and remedy of a pardon which would restore to him the right to vote, although he was aware of the same since May of 1977.

Concerning named appellee Carmen Edwards, she had been convicted in the Montgomery City Court for the crime of issuing a worthless check in May of 1978. Her testimony revealed that she was notified that she would have to wait one year before she could apply to obtain a pardon and therefore the right to vote. As in the case of Underwood, she has refused to utilize this simple procedure.

The second hearing in this case involved the previously explained fourth cause of action. The crux of this hearing involved testimony by expert witnesses from both sides, the appellants' expert being J. Mills Thorton, III, a professor of Southern History at the University of Michigan. It was the contention of the State of Alabama at this hearing, as buttressed and amplified by the testimony of Thornton, that section 182 of the Alabama Constitution of 1901 was passed for political reasons, that it was passed with the intent to disfranchise whites

as well as blacks, a brief summary of this testimony being as follows.

According to Dr. Thorton, the purpose of the Alabama Constitutional Convention of 1901 in adopting section 182, was *political,* i.e. to repel the populist revolt and to make it impossible for the Democratic party in Alabama to be again challenged. In Thornton's opinion, the passage of section 182 was part and parcel and in furtherance of this avowed *political* purpose of the convention. Since the populists were made up of predominently poor whites, and the Democratic party predominently of rich and conservative whites, the blacks became the block of votes that would decide which party's candidates got elected. Therefore, according to Thornton, the following was abundantly clear:

That the disfranchisement of poor whites was an equally important intention and motive of the delegates to the Constitutional Convention of 1901 and the drafters of the Constitutional provisions resulting from the convention as was the disfranchisement of blacks.[3] Section 182 of the Constitution of Alabama of 1901 was part of the plan, purpose and intention of the delegates to the convention, according to Thornton, to prevent and disfranchise poor whites as well as blacks, for political reasons.

In support for this opinion, Thornton cited various pieces of documentary evidence, articles or written materials published shortly after the Convention, the inner play and applicability of other sections passed by the Constitutional Convention which demonstrated that section 182 applied with equal force and effect and with the purpose to disfranchise poor whites as well as blacks, e.g. section 178, 180 and 194 of

[3]In the decision of the Court below, it is held that the appellants did not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of the test announced in *Village of Arlington Heights v. Metropolitan Developing Corp.,* 429 US 252 (1977). However, it is more than obvious from the above testimony of Thornton that the appellants did introduce evidence in support of their theory that the denial of the vote to poor whites was a permissible motive for the enactment of section 182.

the Constitution of Alabama of 1901, sections 178 and 194 being poll tax provisions, which had the effect of disfranchising more whites than blacks, and finally the fact that section 182 was hardly debated or mentioned at all at the convention, a fact recognized and agreed to by the Court below. The scant reference to section 182 at the Convention, according to Thornton, was because Alabama's prior constitution, that being the Constitution of 1875, already had a provision that provided for the disfranchisement of any one convicted of a crime which resulted in imprisonment in the penitentiary. Section 182 of the Alabama Constitution of 1901 repeated this phrase and then added a long list of crimes. However, each crime listed carried a punishment upon conviction of imprisonment in the penitentiary. Therefore, this listing was unnecessary because these crimes were all included in the general phrase of disfranchisement for conviction of crimes resulting in imprisonment in the penitentiary. However, according to Thornton, they were added because the white public associated these crimes with blacks and the behavior of blacks to commit such crimes. This, according to Thornton, was an obvious factor that section 182 was not passed for the sole purpose of disfranchising blacks because, as explained, the Constitution of 1875, although phrased differently, already provided for disfranchisement for the conviction of the same type crimes.

Finally, Dr. Thornton testified and emphasized that in reading the proceedings of the Constitutional Convention of 1901 a person should not be mislead. The theme of the speeches and debates is to disfranchise blacks and not to disfranchise any whites. However, Thornton cautions that this is misleading and false and was intended only as a public relations ploy in order to convince the white electorate that they should vote for the articles adopted by the Convention because, in reality, after the expiration of the temporary plan, contained in sections 180 and 181, which would only last 13 months, the entire suffrage article *had the intention to disenfranchise poor whites equally as well as blacks.*

The importance of Thornton's testimony on this appeal is

two-fold. First of all, it demonstrates that section 182 was not passed with the intention to disfranchise blacks or concomitantly, even if one were to conclude that it was, that there was another and permissible motive, the disfranchisement of poor whites as well, not to mention the permissible motive of the State having the right and interest to disfranchise those convicted of moral turpitude crimes.

The appellants raised at the second hearing held in this cause, which was held in July of 1981, the defense that section 182 was not passed with the intent to disfranchise blacks or alternatively that, as explained through the testimony of Dr. Thornton, there was another and permissible motive for the enactment of this provision, not to mention again the right to the State pursuant to the Tenth Amendment and the Fourteenth Amendment to disfranchise those convicted of crimes involving moral turpitude. These issues received favorable treatment from the District Court but received unfavorable treatment in the Court below.

Before closing it is imperative to note the following. All the crimes listed in section 182 which are not punishable by imprisonment in the penitentiary, and which are still viable, involve moral turpitude. See Appendix D-8. Therefore, one can only be disfranchised in Alabama if he is convicted of a felony or a non-felony, i.e. a crime not punishable by imprisonment in the penitentiary, involving moral turpitude. The issue then becomes whether the state can disfranchise persons convicted of moral turpitude crimes, those being the still viable crimes added by the drafters of section 182.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This lawsuit was initially filed in June of 1978. After three opinions from federal appellate courts and untold amounts of time, effort and paper arguing the relative positions of the parties, one fact remains consistently and continually clear: This case involves serious and important federal questions.

It cannot be gainsaid that the Tenth Amendment to the

United States Constitution leaves unequivocally to the States the right to administer the electoral process and to set qualifications and conditions upon the exercise of the franchise. *Pope vs Williams*, 93 US 622 (1904). There can be no argument that:

> ". . . to be sure, the administration of the electoral process is a matter that the Constitution largely entrusts to States. . . ."

Kusper v. Pontikes, 414 US 51 (1933)

It is suggested that at no time, despite frequent opportunity to do so, has this Court ever undermined or weakened this power left specifically to the States by the Tenth Amendment. Quite to the contrary, when given the opportunity, this Court has written sweeping and persuasive comments concerning the power of a state to control their elections, e.g. *Lassiter vs North Hampton County Board of Elections*, 360 US 45 (1959) and *Oregon vs Mitchell*, 400 US 112 (1970). Importantly enough, for purposes of this appeal, this Court has even specifically written to the point that in controlling elections, the state may consider the criminal record of those who vote at its elections. We submit the following from *Lassiter*, supra.:

> ". . . we do not suggest any standards which a State desires to adopt may be required of voters. *But there is a wide scope of exercise of its jurisdiction.* Resident requirements, age, *previous criminal record*, . . . are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. . . ." (citations omitted) (emphasis supplied)

Lassiter v North Hampton Board of Elections, supra. 3 L.Ed.2d 1072 at page 1077.

The opinion of the Court below has the effect of conflicting and interfering with these previous pronouncements of this Court. Section 182 of the Constitution of Alabama of 1901 allows disfranchisement for felonies and for crimes involving moral turpitude, whether felonies or not. This certainly seems to be a restriction within the realm of authority and jurisdiction left to the States by the Tenth Amendment and as re-

inforced by this Court in the decisions cited above. To elect to disfranchise non-felons who commit crimes involving moral turpitude is certainly within the sphere contemplated by the Tenth Amendment, it being obvious that in determining an individual's previous criminal record, the State may attach more significance to crimes involving moral deprivatity or baseness, for such a distinction does not offend the equal protection clause of the Fourteenth Amendment. See *Oregon vs. Mitchell,* 400 US 117 (1970).

The decision of the Court below violates the Tenth Amendment right of the State of Alabama to control its elections and to set the qualifications for its voters. To hold otherwise would destroy the complicated fabric woven by the framers of the United States Constitution and ratified by this Court in dealing with matters left to the States for consideration or ones in which the State's interest must succumb to that of the Federal Government.

Yet still another important and substantial federal question involves the Fourteenth Amendment to the United States Constitution. This analysis is based upon this Court's decision in *Richardson vs Ramirez,* 418 US 24 (1974). It is submitted that the rationale espoused in that case allows the State of Alabama the right to constitutionally disfranchise misdemeanants pursuant to section 2 of the Fourteenth Amendment as the "affirmative sanction" language in that section does not specify felonies only but refers rather to "other crimes." A close study of the *Ramirez* opinion demonstrates that the legislative intention was not to limit section 2 of the Fourteenth Amendment to felonies only but rather to have it apply to "other crimes".

This obvious sentiment is expressly seen in the following language from *Ramirez:*

> ". . . the legislative history bearing on the meaning of the relevant language of section 2 is scant, indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation on the States, rather than the two forms of disfranchisement which were ex-

> empted from that consequence by the language which we are concerned here. *Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.*" (emphasis supplied)

Richardson vs Ramirez, 418 US 24, 43 (1974).

Further, other portions of *Ramirez,* supra., illustrate that this decision is clear authority for the proposition that a State may disfranchise some individuals that have committed crimes carrying a maximum punishment of less than twelve months incarceration and not others. The recognition of the propriety of such is seen in this explanation by Mr. Justice Rehnquist:

> ". . . Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho . . . Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision. *In Lassiter vs North Hampton County Board of Elections,* . . . where we upheld North Carolina's imposition of a literacy requirement for voting, the Court said 'resident requirements, age, previous criminal record, . . . are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters.' "

Richardson vs Ramirez, supra., 418 US 24 at page 53.

An obvious conflict appears for this Court to decide. The Court below concluded that section 182 violated section 1 of the Fourteenth Amendment to the United States Constitution. However, it is submitted by the State of Alabama that it has the right, pursuant to section 2 of the Fourteenth Amendment, to disfranchise those convicted of moral turpitude misdemeanors. If this is so, then the Court below erred in its holding. While not admitting that the framers of section 182 had the intention to discriminate against blacks, even if this was

the case, the State of Alabama, pursuant to Section 2 of the Fourteenth Amendment, would have the authority to still disfranchise moral turpitude misdemeanants. This Court's reliance on *Lassiter*, supra., and especially the language from that case recognizing the ability of the State to consider previous criminal record in deciding the qualifications of voters, in reaching a decision in *Ramirez*, supra., suggests that the State of Alabama cannot be condemned for what happened in this case.

Moreover, it is the additional contention of the State of Alabama that it has a compelling interest in disfranchising those who commit crimes involving moral turpitude, regardless of the length of punishment for the commission of such a crime. Consequently, the reason for the passage of section 182 would make no difference, the State not admitting in advance such an argument that section 182 was passed with any discriminatory intent. In this regard, we would direct this Court to *Kronlund vs Honstein*, 327 F Supp 71 (N.D. GA 1971). In that case, the plaintiff attacked a section of the Georgia Constitution on the ground that it unconstitutionally deprived her of rights guaranteed by the equal protection clause of the Fourteenth Amendment and by the First and Eighth Amendment to the Constitution. The provision in issue there, section 2-801 of the Georgia Constitution, disqualified those from voting who had been convicted of certain listed crimes or of any crime involving moral turpitude punishable by imprisonment in the penitentiary. Plaintiff had been convicted of smuggling heroin into the United States, a crime determined by the District Court to involve moral turpitude.

The *Kronlund* Court rejected plaintiff's contention that the provision was unconstitutional on its face and as applied to her. The Court recognized that a State may constitutionally disfranchise otherwise qualified voters because they have been convicted of a felony. However, the *Kronlund* Court went further and found that disfranchising only those convicted of moral turpitude crimes and not those convicted of non-moral turpitude crimes served a compelling state interest. In so hold-

ing that Georgia had a compelling State interest in disfranchising those convicted of crimes involving moral turpitude, the Court noted as follows:

> "A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior, whose behavior can be said to be destructive of society's aims. For this reason, a State may prohibit idiots and insane persons as well as those convicted of certain offenses from participating in her elections. A State may also legitimately be concerned that persons convicted of certain crimes may have a greater tendency to commit election offenses. Therefore, Georgia has a compelling State interest sufficient to justify the voting restrictions set forth in section 2-801 of the Georgia Constitution. Since the State does have this legitimate interest to protect, this provision does not unjustifiably abridge the plaintiff's First Amendment rights."

Krolund vs Honstein, supra., 327 F Supp 71, at page 73.

The State would be remiss in advancing this argument not to mention the very important case of *Washington vs State*, 75 Ala. 582 (1884). In that case, the Alabama Supreme Court, in a racially neutral context, this occurring some seventeen years before the Constitutional Convention of 1901, recognized that the State had an interest in disfranchising those who had been convicted of a crime involving moral turpitude. As stated by the Court,

> ". . . The presumption is that one rendered infamous by conviction of a felony or other base offense indicative of great moral turpitude is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with free men who are clothed by the State with a toga of political citizenship. . . ."

Washington vs State, 75 Ala. 582, 585 (1884)

Consequently, again without admitting that the framers of the Alabama Constitution of 1901 had a discriminatory intent in passing section 182, it would make no difference what their intentions were because section 182 merely fulfilled a valid

State interest, that is disfranchising those that have been convicted of crimes involving moral turpitude.

Finally, the Court below failed to recognize the existence of permissible motives for the enactment of section 182 thereby allowing a State constitutional provision over eighty years in age to be stricken. The court below has incorrectly interpreted this Court's decisions and as a result his unconstitutionally applied the Fourteenth Amendment to reach an erroneous result.

As already noted, the State has the right pursuant to the Tenth and the Fourteenth Amendment to disfranchise those who commit crimes involving moral turpitude regardless of the length of confinement. These constitutional provisions serve as more than ample authority for permissible motives by the State of Alabama in enacting section 182. It is incongruous and lacking in logic to state on one hand that the State has the right to disfranchise those who commit crimes involving moral turpitude but to ignore this right when one alleges that the vehicle for such disfranchisement was passed based upon an impermissible motive.

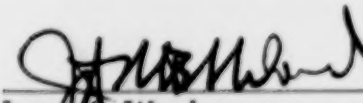
Moreover, the above referred to testimony of Dr. Thornton suggests yet more permissible motives for the passing of section 182. This testimony is clear that this section was passed for political purposes or with the purpose to disfranchise poor whites equally with blacks. A reading of his testimony makes this clear and the Court below erred by stating that this permissible motive was never advanced by the appellants.

Consequently, either because of the State's constitutional interests or because of the testimony adduced from the expert Thornton, the State demonstrated that section 182 would have passed even in the absence of any alleged racial motive. See *Mount Healthy City School District Board of Education vs. Doyle*, 429 US 274 (1977). Therefore, the District Court below erroneously voided as repugnant to the United States Constitution section 182 of the Alabama Constitution of 1901.

CONCLUSION

For the reasons stated above, appellants submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,



James A. Ward
Special Assistant Attorney General
Attorney for Nell Hunter,
et al-Appellants

COUNSEL

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CERTIFICATE OF SERVICE

I, James S. Ward, a member of the Bar of the Supreme Court of the United States and counsel of record of Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, appellants herein, hereby certify that on July 9, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on each of the parties herein as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On the Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, D.C. 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General, and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated: July 9, 1984

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

AFFIDAVIT OF SERVICE

STATE OF ALABAMA)

JEFFERSON COUNTY)

I, James S. Ward, depose and say that I am an attorney in the law firm of Ward & McKnight and I am the attorney of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, the appellants herein, and that on 9 day of July, 1984, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on each of the parties required to be served herin, as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On the Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, D.C. 20530.

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ney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, D.C. 20530.
All parties required to be served have been served.

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

Sworn to and subscribed before
me this the 9 day of July, 1984.

Notary

APPENDICES

APPENDIX A

Opinion Below

Victor UNDERWOOD and Carmen Edwards, for themselves and all others similarly situated, Plaintiffs-Appellants.

v.

Nell HUNTER, et al.,
Defendants-Appellees.

No. 82-7011.

United States Court of Appeals,
Eleventh Circuit.

April 10, 1984.

Plaintiffs who were barred from representation on election rolls filed suit against counties' boards of registrars under sections 1981 and 1983 challenging, as discriminatory, state constitutional section under which they were disfranchised. The United States District Court for the Northern District of Alabama, Frank H. McFadden, J., entered judgment in favor of plaintiffs on two of five causes of action, and plaintiffs appealed. The Court of Appeals, Vance, Circuit Judge, held that state constitutional section disfranchising those convicted of, inter alia, crimes of moral turpitude violated the Fourteenth Amendment by denying plaintiffs' right to vote on basis of race.

Reversed and remanded with instructions.

1. Elections

A successful Fourteenth Amendment claim of race discrimination in matters affecting voting requires that plaintiffs establish an intent to abridge the franchise on account of race. U.S.C.A. Const. Amend. 14.

2. Constitutional Law

In a case alleging discrimination on basis of race, permissible motivating interest articulated by the state must be com-

pelling, and means employed must be precisely drawn to accomplish exactly objective that state purports to further.

3. Federal Courts

On review, district court's findings of fact are entitled to be respected unless they are clearly erroneous.

4. Federal Courts

Under clearly-erroneous standard, lower court's findings of fact shall stand unless reviewing court is left with definite and firm impression that mistake has been made.

5. Federal Courts

Clearly-erroneous standard of review applies to findings of both subsidiary and ultimate fact.

6. Federal Courts

Questions of law are subject to independent review, and findings made under an erroneous review of law may be set aside on that basis.

7. Constitutional Law

Plaintiffs, who were barred from representation on election rolls pursuant to state constitutional section disfranchising those convicted of, inter alia, crimes of moral turpitude, met burden of showing that the section was specifically adopted with intent to disfranchise blacks on account of their race, and state failed to meet burden to demonstrate that the section would still have been adopted had a permissible state reason been the sole consideration; therefore, the section violated the Fourteenth Amendment by denying plaintiffs' right to vote on basis of race. U.S.C.A. Const.Amend. 14; Ala.Const. § 182.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

VANCE, Circuit Judge:

In 1977 and 1978 the boards of registrars for Montgomery and Jefferson Counties in Alabama barred Carmen Edwards

and Victor Underwood, respectively, from representation on the election rolls. They were denied voting privileges under section 182 of the Alabama Constitution, adopted in 1901, which disfranchises those convicted of crimes punishable by imprisonment in the penitiary, crimes of moral turpitude and other enumerated misdemeanors and felonies.[1] Edwards and Underwood were disfranchised for presenting worthless checks, a misdemeanor which the registrars classify as a crime of moral turpitude.[2]

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[1]Section 182 of the Alabama Constitution of 1901 provides:

> The following persons shall be disqualified both from registering, and from voting, namely:
>
> All idiots and insane persons, those who shall be reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

[2]In determining whether an offense is a crime of moral turpitude, the registrars follow Alabama case law and, in the absence of judicial decision, opinions of the state attorney general. The registrars' actions in this case were based on opinions of the attorney general. In *Pippin v. State*, 197 Ala. 613, 73 So. 340 (1916), the Alabama Supreme Court defined a crime of moral turpitude as an act that is " 'immoral itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.' " *Id.* at 616. 73 So. at 342 (quoting *Fort v. City of Brinkley*, 87 Ark. 400, 112 S.W. 1084 (1908))). The attorney general in opinion has acknowledged that the classification of presently unaddressed offenses "will turn upon the moral standards of the judges who decide the question." Pl.Exh. 3; *see also infra* note 13. "Thus does the serpent of uncertainty crawl into the Eden of trial administration." McCormick, *McCormick on Evidence* § 43, at 85-86 (2d ed. 1972).

Edwards and Underwood filed suit against the boards of registrars of Montgomery and Jefferson Counties under 42 U.S.C. §§ 1981 and 1983 challenging section 182 as it applies to those convicted of crimes not punishable by imprisonment in the penitentiary (nonprison offenses). They alleged five causes of action, one of which is dispositive. Plaintiffs alleged that the nonprison offenses warranting disfranchisement under section 182 were specifically adopted with the intent to disfranchise blacks on account of their race and that the provision has had exactly its intended effect.[3] They requested a declaration invalidating section 182 and sought to enjoin its future application. With respect to the two claims proceeding to trial, the district court certified a plaintiff class of those disfranchised for nonprison offenses, represented by Underwood and Edwards,[4] and a defendant class of all Alabama county boards of registrars. Following trial in 1981, the district court issued

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[3]Plaintiffs also alleged: (1) that the section denies the franchise to plaintiffs without a compelling state interest in contravention of the first, fifth and fourteenth amendments; (2) that the section denies plaintiffs equal protection of the laws because more serious crimes are not disabling; (3) that the term "crime involving moral turpitude" is unconstitutionally vague; and (4) that the suffrage provisions of the 1901 Alabama Constitution are stricter than those of the 1868 Constitution, in violation of the Act of Readmission, Act of June 25, 1868, ch. 70, 15 Stat. 73.

Before plaintiffs amended their complaint to add the Readmission Act claim, the district court granted summary judgment for the registrars on the first three causes and dismissed the race discrimination claim for failure to state a claim upon which relief could be granted. We reversed and remanded for further proceedings. *Underwood v. Hunter*, 604 F.2d 367 (5th Cir. 1979). During subsequent discovery plaintiffs moved for a preliminary injunction premised on the first three theories so that they could vote in the 1980 primaries and general election. We affirmed the order of the district court denying relief because we concluded that plaintiffs had not shown any prospect of irreparable harm. *Underwood v. Hunter*, 622 F.2d 1042 (5th Cir. 1980). After the first three claims were again dismissed by the trial court, the Readmission Act claim proceeded to trial with the race discrimination claim.

[4]Edwards is black and Underwood is white. From the record of the proceedings below it appears that for purposes of the race discrimination claim the trial court treated Edwards as the representative of a subclass of blacks disfranchised by virtue of conviction of nonprison offenses.

a memorandum opinion ruling for defendants on these two causes of action. Plaintiffs filed this appeal challenging the disposition of all five claims. We hold that section 182 violates the fourteenth amendment because it denies plaintiffs the right to vote on the basis of race.[5]

[1, 2] A successful fourteenth amendment claim of race discrimination in matters affecting voting requires that plaintiffs establish an intent to abridge the franchise on account of race. *City of Mobile v. Bolden*, 446 U.S. 55, 66-67, 100 S.Ct. 1490, 1499-1500, 64 L.Ed.2d 47 (1980) (plurality opinion); *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976). To establish a violation of the fourteenth amendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor in the adoption of section 182. They shall then prevail unless the registrars prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 & n. 21, 97 St.Ct. 555, 566 & n. 21, 50 L.Ed.2d 450 (1977); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). In a case alleging discrimination on the basis of race, the permissible motivating interest articulated by the state must be

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[5]The registrars argue that mootness and failure to exhaust administrative remedies bar us from reaching the merits. Exhaustion of administrative remedies, however, is not a prerequisites to the bringing of this action under 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). The charge of mootness lacks support. In 1980 the office of the state attorney general issued an opinion letter declaring that convictions under municipal ordinances would not warrant disfranchisement. Def.Exh. 2. The registrars argue on the basis of this directive that Edwards might now qualify for registration because worthless check writing is a violation of both city ordinance and state statute. They have adduced no proof that Edwards was convicted of a municipal offense alone and in the meantime they have not offered to reverse their original decision barring registration. We therefore discern nothing that in any way extinguishes Edwards' claim.

compelling, *Crawford v. Board of Education*, 458 U.S. 527, 536, 102 S.Ct. 3211, 3217, 73 L.Ed.2d 948 (1982), and the means employed must be precisely drawn to accomplish exactly the objective that the state purports to further. *Kramer v. Union Free School District*, 395 U.S. 621, 632, 89 S.Ct. 1886, 1892, 23 L.Ed.2d 583 (1969).

The district court found that plaintiffs failed to show evidence of discriminatory purpose in the adoption of section 182. It next concluded that even if a racial animus was demonstrated, the state's purported interest in denying criminals the the franchise is a permissible one.

[3-6] We cannot agree with the district court. Our review of the record reveals that the district court erred both in its factual findings and in its legal analysis.[6] We conclude that the district court's finding of lack of discriminatory intent in the adoption of section 182 is clearly erroneous. In addition, the district court failed to require the state to show that section 182 would have been enacted in the same form in the absence of racial animus, as *Arlington Heights* requires. By allowing the state to prevail on what the district court concluded was a showing of permissible intent, the court brought its inquiry to a premature end.[7]

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[6]On review the district court's findings of fact are entitled to be respected unless they are clearly erroneous. *Hardin v. Stynchcomb*, 691 F.2d 1364, 1372 (11th Cir. 1982). Under the clearly erroneous standard, the lower court's findings of fact shall stand unless the reviewing court is left with the definite and firm impression that a mistake has been made. *American National Bank v. Federal Deposit Insurance Corp.*, 710 F.2d 1528, 1533-34 (11th Cir. 1983). This standard of review applies to findings of both subsidiary and ultimate fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983). Questions of law are subject to independent review, and findings made under an erroneous view of the law may be set aside on that basis. *Pullman-Standard*, 456 U.S. at 287, 102 S.Ct. at 1789.

[7]The court held that plaintiffs would not have prevailed even if they had shown discrimination because the court discerned a permissible reason for restricting the franchise of criminals. Citing *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), and the plurality

Applying the *Arlington Heights* test to the case at hand, the first step is to inquire whether intent to deny the franchise on the basis of race was a substantial or motivating factor in the enactment of 182. In conducting this inquiry we are mindful of the testimony by expert witnesses for both sides

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opinion in *Michael M. v. Superior Court*, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981), the district court ruled that "an impermissible motive standing alone will not invalidate legislation for which there is a permissible basis."

The lower court's reliance on *Michael M.* is misplaced. In *Michael M.*, Justice Rehnquist, writing for a plurality of the Court, quoted *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to the effect that the existence of an illicit legislative motive does not *automatically* result in a conclusion of unconstitutionality. 450 U.S. at 472 n. 7, 101 S.Ct. at 1205-06 n. 7. The plurality proceeded to cite the burden-shifting test announced in note 21 of *Arlington Heights*, signifying that discriminatory intent *will* defeat a statute where the state is unable to demonstrate that the same result would have occurred solely in light of a permissible motive.

We do not read *Palmer* to the contrary. In *Arlington Heights* the Court cited *Palmer* as support for the proposition that a plaintiff need not necessarily prove that racial discrimination was the sole motivating factor in order to prevail:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.[11]
>
> [11]In *McGinnis v. Royster*, 410 U.S. 263, 276-277, 93 S.Ct. 1055, 1063, 35 L.Ed.2d 282 (1973), in a somewhat different context, we observed: "The search for legislative purpose is often elusive enough, *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

429 U.S. at 265 & n. 11, 97 S.Ct. at 563 & n. 11. In light of this passage, we conclude that *Arlington Heights* supersedes any dicta which *Palmer* might contain to the effect that a permissible purpose will always defeat an impermissible motive. *See also Washington v. Davis*, 426 U.S. at 242-43, 96 S.Ct. at 2048-49 (*Palmer* "did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences"); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 Yale L.J. 328, 330 (1982).

that the purpose of section 182 must be considered in light of the overall purpose of the 1901 constitutional convention and the suffrage article, taken as a whole.

Blacks first received the right to vote in Alabama under the Constitution of 1867, which created universal suffrage for males over the age of twenty-one with certain exceptions not relevant here. Ala. Const. of 1867, art. VII. With the end of Reconstruction, the white citizens of Alabama moved to reassert their once unquestioned political supremacy. The 1890's ushered in an era of disfranchisement not only in Alabama but throughout the South. In 1890 Mississippi adopted a new state constitution embodying the suffrage restrictions proposed in the "Second Mississippi Plan." By 1908 eleven other states, including Alabama, had followed suit through various statutory and constitutional devices. S. Hackney, *Populism to Progressivism in Alabama* 147 (1969); C. Woodward, *Origins of the New South 1877-1913* 321 (1971).

In the judgment of modern scholars, the organizers of the 1901 Alabama convention sought to disfranchise poor dissident whites as well as blacks. M. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* 249, 269 (1955) (Def.Exh. 14). With the ascendency of the Populists a decade earlier, the black vote had acquired added leverage. Whites, Democrats and Populists alike, vied for black ballots in any way they could, with favors, pardons of convictions, outright vote purchase and massive electoral fraud. *United States v. State of Alabama,* 252 F.Supp. 95, 98 (M.D.Ala.1966) (three-judge court); S. Hackney, *supra,* 36-37, 89, 176-77. As the court below noted, resort to such methods had become increasingly precarious in light of renewed Northern moves to extend the federal election supervisory act of 1870. In 1890 the Senate had narrowly defeated the Lodge force bill, which called for tighter federal control of all phases of voting, from voter registration to ballot tabulation. J. Kousser, *The Shaping of Southern Politics* 29-30 (1974); C. Woodward, *supra,* at 254-55. The most effective way to ward off federal intervention as well as fraud, accord-

ing to the reformers, was to eliminate the Negro vote. S. Hackney, *supra,* at 146, 175-77; M. McMillan, *supra,* at 269; C. Woodward, *supra,* at 326-27. In the words of one delegate to the 1901 convention, "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes." Speech of Delegate William A. Handley, III *Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901* 2276-77 (1940) [hereinafter cited as *Official Proceedings*].

When the Alabama constitutional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally. In his opening address John B. Knox, the president of the convention, declared:

> And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution,. to establish white supremacy in this State.

I *Official Proceedings* at 8; *see also Journal of the Proceedings of the Constitutional Convention of the State of Alabama* 1776 (1901). In Knox' words, "if we would have white supremacy, we must establish it by law—not by force or fraud." I *Official Proceedings* at 9. Borrowing from the successful methods of the Second Mississippi Plan and those of other states,[8] the suffrage committee set about to achieve this objective by setting on devices that would subvert the guarantees of the fourteenth amendments without directly provoking a legal challenge. In hopes of success, the committee made resort to facially neutral "tests that took advantage of differing social conditions. Property tests, literacy tests, and disqualification for conviction of certain crimes all fell into this category." S. Hackney, *supra,* at 192; *see also* Deposition of J. Morgan Kousser (Pl.Exh. 9).[9]

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[8] I *Official Proceedings* at 10-13; J. Kousser, *supra,* at 39-40, 189; M. McMillan, *supra,* at 272-75 (Pl.Exh. 12).

[9] In 1898 the Supreme Court held that the Second Mississippi Plan passed muster under the fourteenth amendment. *Williams v. Mississippi,* 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1898). The Mississippi pro-

The result was an exceptionally byzantine suffrage scheme. S. Hackney, *supra,* at 193; M. McMillan, *supra,* at 359.[10]

While there is scant record of the debates over section 182, the sources of the crimes selected for inclusion in and exclusion from section 182 shed light on the motives of its drafters. In enumerating the crimes that would trigger disfranchisement, the suffrage committee chose offenses that were "peculiar to the Negro's low economic and social status," such as petty property offenses, wife-beating and sex-related crimes. P. Lewinson, *Race, Class & Party* 81 & n. 7 (1963) (cited in (Pl.Exh. 12). The crimes selected by the suffrage committee had their origin in an ordinance drafted and submitted by John Fielding Burns, a Black Belt planter. *See* I *Official Proseedings* at 511. According to Dr. McMillan:

> [t]he crimes [Burns] listed were those he had taken cognizance of for years in his justice of the peace court in the Burnsville district, where nearly all his cases involved Negroes. For example, among those [Burns would have] disfranchised were persons guilty of larceny, bigamy,

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visions included a poll tax and a literacy test coupled with an understanding clause as a loophole for poor whites. *Id.* at 217 n. 1, 18 S.Ct. at 585 n. 1.

As the district court noted, the Alabama proposal that the delegates feared was most vulnerable to constitutional attack was the temporary fighting grandfather clause, section 180. Under that clause veterans and their descendants automatically qualified to register until January 1, 1903, when a permanent provision imposing literacy and property restrictions, section 181, took effect. The Supreme Court later confirmed the delegates' fears when it invalidated a similar Oklahoma grandfather clause. *Guinn v. United States,* 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915). Adoption of facially neutral and severable measures such as section 182 was a critical line of defense in case other parts of the suffrage plan did not withstand attack. Deposition of J. Morgan Kousser.

[10]Under the permanent plan which took effect on January 1, 1903, Ala. Const. art. VIII, § 181, citizens had to satisfy requirements of sex, age, residence, literacy and gainful employment or property ownership before they could register. *Id.* §§ 177-178, 181. Registered voters further had to pay a cumulative poll tax of $1.50 per year before they could cast a ballot. *Id.* §§ 178,194. A three-judge court struck down the Alabama poll tax as violative of the fifteenth amendment in *United State. v. Alabama,* 252 F.Supp. 95 (M.D.Ala. 1966) (Rives, J.).

> seduction, incest, rape, or attempt to rape, burglary, or attempt to burglarize, vagrancy, wife beating, forgery and "those who are bastards or loafers or who may be infected with any loathsome or contagious disease."

M. McMillan, *supra,* at 275 n. 76. In newspaper accounts, "Burns estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes." J. Gross, *Alabama Politics and the Negro, 1874-1901* 244 (1969) (cited in Pl.Exh. 9).

According to experts for both sides, the evident racial animus of section 182 was used to induce delegates representing poor whites to vote for other provisions in the suffrage article, such as the poll tax, that were contrary to their interests. Whatever the folly of their vote, their perceptions of the disparate impact of section 182 turned out to be correct. The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.[11]

[7] In reviewing this record we are left with a firm and definite impression of error by the court below with respect to the issue of intent. Plaintiffs have more than shouldered their burden of showing that discriminatory intent was a motivating factor in the adoption of section 182; they have presented evidence from which the district court was required to find as a matter of law that discriminatory intent motivated section 182.[12] We therefore turn to the state's burden to demon-

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[11]Because the registrars have not raised the issue whether blacks commit nonprison offenses generally in similarly disproportionate numbers, we do not reach that question.

[12]In fact, the registrars concede the point in brief. They argue, however, that the first prong of *Arlington Heights* is not satisfied because the delegates also intended to deny suffrage to lower-class whites. This is an erroneous reading of the law. Under *Arlington Heights* plaintiff need only show that racially discriminatory intent was *a* motivating factor

strate that the section would still have been adopted had a permissible state reason been the sole consideration.

The registrars rely on a purported state interest in denying the franchise to those convicted of violating its laws. Assuming without deciding that this asserted state interest would pass constitutional muster, we are unable to discern any evidence that the rule was actually intended to serve that interest. *Scheinberg v. Smith*, 659 F.2d 476, 483 n. 2 (5th Cir. Unit B 1981).

In the first place, we note several glaring omissions from the nonprison offenses resulting in disfranchisement under section 182.[13] While underinclusiveness in and of itself does not establish a discriminatory intent, once such intent is shown, underinclusiveness is relevant to whether a second, permissible purpose also motivated the drafters. Had the convention truly wished to vindicate a "good government" purpose, it would have included all crimes not punishable by imprisonment in the penitentiary. *Compare Trimble v. Gordon*, 430 U.S. 762, 768 n. 13, 97 S.Ct. 1459, 1464 n. 13, 52 L.Ed.2d 31 (1977); *O'Brien v. Skinner*, 414 U.S. 524, 530, 94 S.Ct. 740, 743, 38 L.Ed.2d 702 (1974). Nothing in the convention proceedings or the constitution itself suggests a good government purpose. *See Trimble*, 430 U.S. at 768 & n. 13, 97 S.Ct. at 1464 n. 13; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 641 n. 9, 94 S.Ct. 791, 797 n. 9, 39 L.Ed.2d 52 (1974); L. Tribe,

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behind the challenged legislation. Without question that was done here. The registrars do not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of *Arlington Heights*.

[13]In 1975, the year in which Underwood committed the offense for which he was convicted, nonprison offenses that were neither enumerated in section 182 nor involved moral turpitude and that thus were free from disability included: second-degree manslaughter (carrying a maximum sentence of 12 months and a maximum fine of $500); assault on a police officer (12 months; $1,000); assault and battery (6 months; $500); mailing pornography (12 months; $2000); and aiding the escape of a misdemeanant (12 months; $1000). By contrast, Underwood, who was convicted for issuing a worthless $77.41 check, risked a maximum penalty of a $100 fine for a first offense. For repeated offenses, the most serious punishment authorized was a sentence of three months and a fine of $400.

American Constitutional Law § 12-8, at 602 & n. 1; *id.* § 16-30, at 1085-88 (1978). Indeed, while it is true that the avowed objective of the suffrage committee was to deny the vote to the corrupt and the ignorant, *see* I *Official Proceedings* at 1257, defendants' expert freely admitted under cross-examination that the phrase the "corrupt and the ignorant" referred specifically to blacks and lower-class whites. The same good government rationale, presented in defense of the Alabama poll tax, a sister provision to section 182, struck the late Judge Rives as nothing more than "ingenious after-thought." *United States v. Alabama,* 252 F.Supp. at 101. We hasten to agree and conclude that the registrars as a matter of law failed to present any evidence whatsoever of permissible intent. There was no evidence from which the district court could have found that section 182 would have been adopted had a permissible reason been the sole consideration.[14]

We recognize the registrars' good faith in administering the statute without reference to race. Neither their impartiality nor the passage of time, however, can render immune a pur-

[14]As evidence to the contrary, the state points to *Washington v. State,* 75 Ala. 582 (1884). In that case the Alabama Supreme Court announced in a racially neutral context that the state had the right to preserve the integrity of the vote by disfranchising those who had been convicted of crimes involving moral turpitude. *Id.* at 585. Before this court defendants argue that the holding of that case must have been the motivating force behind section 182 since most of the delegates to the 1901 convention were lawyers and presumably were aware of it. We agree with plaintiffs that this is too attenuated a causal link to prove that section 182, which swept in certain enumerated misdemeanors as well as crimes of moral turpitude, would have appeared in the same form absent racial motive. The decision preceded the convention by seventeen years. Significantly, defendants point to no passage in the proceedings or in the committee report accompanying section 182 that invoked *Washington v. State* as authority for the suffrage provision. As we admonished in *Scheinberg,* 659 F.2d at 483 n. 2, it is improper for us to speculate as to any permissible state purposes that might exist when fundamental rights or the rights of a suspect class are at stake. For the same reason, we cannot give credence to the state's argument that the 1901 expansion of the disabling crimes listed in the 1875 Alabama Constitution demonstrates an affirmation of what the state assumes was the good government purpose of the Redemption-era provision.

posefully discriminatory scheme whose invidious effects still reverberate today.

We hold that section 182 of the Alabama Constitution of 1901 violates on account of race the fourteenth amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary. Since those provisions of section 182 that disfranchise nonprison offenders lack legal effect, *Dorchy v. Kansas*, 264 U.S. 286, 289-90, 44 S.Ct. 323, 324, 68 L.Ed. 686 (1924); *see INS v. Chadha*, ___ U.S. ___, 103 S.Ct. 2764, 2775, 77 L.Ed.2d 317 (1983) (citing *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 564-65, 76 L.Ed. 1062 (1932)), we do not reach the additional claims that plaintiffs press. The district court shall issue an injunction ordering voter registration upon request by members of plaintiff class who qualify in all other respects for registration on the electoral rolls.

REVERSED and REMANDED with instructions.

APPENDIX B

Opinion Below

Victor UNDERWOOD and Carmen Edwards, for themselves and all others similarly situated, Plaintiffs-Appellants,

v.

Nell HUNTER et al., Individually and on behalf of all other members of Boards of Registrars in the State of Alabama, Defendants-Appellees.

No. 79-1573
Summary Calendar*

United States Court of Appeals,
Fifth Circuit.

Oct. 10, 1979.

Suit was brought to challenge the section of the Alabama Constitution which disfranchises those convicted of certain crimes. The United States District Court for the Northern District of Alabama, Frank H. McFadden, Chief Judge, dismissed the complaint with prejudice, and plaintiffs appealed. The Court of Appeals held that: (1) when the court sua sponte converts a motion to dismiss into a summary judgment motion by considering matters outside the pleadings, there must be strict adherence to the notice and hearing requirements; (2) it was an abuse of discretion for the district court to grant summary judgment without proper notice and without giving plaintiffs an opportunity to present material and arguments going to the issue of summary judgment; and (3) the allegation that the list of disfranchising offenses found in the challenged constitutional provision was specifically adopted with the intent to disfranchise blacks and in fact abridged the

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

right to vote on the basis of race stated a claim upon which relief could be granted.

Vacated in part and reversed and remanded in part.

1. Federal Civil Procedure

There must be strict adherence to the notice and hearing requirements when the court sua sponte converts a motion to dismiss for failure to state a claim into a summary judgment motion by considering matters outside the pleadings. Fed.Rules Civ.Proc. rules 12(b), (b) (6), 56, 56(c), 28 U.S.C.A.

2. Federal Civil Procedure

Though a motion to dismiss may result in a rejection of the pleadings, it does not go to the merits of the case. Fed.Rules Civ.Proc. rule 12(b), 28 U.S.C.A.

3. Federal Civil Procedure

Where, after hearing on motion for preliminary injunctive relief was set, defendants moved to dismiss the complaint for failure to state a claim and where the district court, after beginning the proceeding as a hearing on a preliminary injunction, expanded the proceeding to consider arguments on the motion to dismiss as a motion for summary judgment and granted summary judgment for defendants without giving plaintiffs the required ten-day notice and an opportunity to present additional material, district court's procedure was an abuse of discretion. Fed.Rules Civ.Proc. rules 12(b), (b) (6), 56, 56(c), 28 U.S.C.A.

4. Federal Civil Procedure

Where complaint to challenge the section of the Alabama Constitution which disfranchises those convicted of certain crimes alleged that the list of disfranchising offenses was specifically adopted with the intent to disfranchise blacks and in fact abridged the right to vote on the basis of race, it was error for the district court to dismiss the cause of action on the ground that the court could not invalidate a facially neutral statute on the basis of improper motive; plaintiff's

challenge was not based solely on the motive behind the legislation but also included an allegation of the section's discriminatory impact in fact. Const. Ala.1901, § 182; U.S.C.A. Const. Amends. 5, 14.

5. Federal Civil Procedure

On motion to dismiss complaint alleging that the list of offenses found in the section of the Alabama Constitution which disfranchises those convicted of certain crimes was adopted with the intent to disfranchise blacks and in fact abridged the right to vote on the basis of race, court's examination was limited to whether the allegation, if supported by facts developed in later proceedings, stated a claim upon which plaintiffs could recover; on a motion to dismiss, it was irrelevant that there had been no showing of discriminatory impact. Const.Ala.1901, § 182; U.S.C.A.Const. Amends. 1, 5, 14.

6. Civil Rights

Complaint alleging that list of disfranchising offenses found in the section of the Alabama Constitution which disfranchises those convicted of certain crimes was specifically adopted with the intent to disfranchise blacks and in fact abridged the right to vote on the basis of race stated a claim upon which relief could be granted. Const.Ala.1901, § 182; U.S.C.A.Const. Amends. 5, 14; Fed.Rules Civ.Proc. rule 12 (b) (6), 28 U.S.C.A.

Edward Still, Birmingham, Ala., Neil Bradley, ACLU Foundation, Atlanta, Ga., for plaintiffs-appellants.

James S. Ward, Asst. Atty. Gen., Birmingham, Ala., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before COLEMAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

Appellants challenge Section 182 of the Alabama Constitution, which disfranchises those convicted of certain crimes. In the District Court appellants asserted four causes of action:

(1) the misdemeanors and minor felonies listed in § 182 as disfranchising offenses unconstitutionally impinge upon the franchise because they deny the franchise without a compelling state interest in violation of the First, Fifth, and Fourteenth Amendments of the U. S. Constitution; (2) the disfranchising offenses deny plaintiffs the equal protection of the laws because more serious offenses are not disabling; (3) disfranchisement for conviction of a "crime involving moral turpitude" is based on a definition that is unconstitutionally vague; (4) the list of offenses was specifically adopted with the intent to disfranchise blacks and in fact abridges the right to vote on the basis of race.

Appellants sought a preliminary injunction restoring them to the voting rolls and in support of this motion reasserted the first three cause of action. They did not urge the fourth cause of action as a basis for the preliminary injunction. On June 21, 1978, a hearing on the preliminary injunction was set for July 19. On July 6, appellants moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The Court began the July 19 proceeding as a hearing on the preliminary injunction, but subsequently expanded it to include arguments on the motion to dismiss. Four witnesses testified at the hearing. On August 11, the Court issued a memorandum opinion in lieu of findings of fact and conclusions of law. It denied the preliminary injunction and held that the plaintiffs failed to state a claim under the first three causes of action. The Court reserved its decision as to the fourth cause of action pending further briefing.

However, as the Court itself noted, the Court heard the motion to dismiss along with the application for a preliminary injunction and was presented with evidence outside the pleadings. The Court further stated that "if the motion to dismiss is treated as a motion for summary judgment under Rule 56, it is due to be granted with respect to the first three causes of action."

Rule 12 (b) of the Federal Rules of Civil Procedure provides that "[i]f, on a motion . . . to dismiss for failure of the plead-

ing to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 56 requires a 10-day notice and an opportunity to present additional material.

[1] This Circuit has upheld the strict requirements of notice embodied in Rule 56 and by reference in Rule 12(b). The procedural facts in *Georgia Southern & Florida Railway Co. v. Atlantic Coast Line Railroad Co.*, 5 Cir. 1967, 373 F.2d 493, *cert. denied*, 389 U.S. 851, 88 S.Ct. 69, 19 L.Ed.2d 120 (1967), were quite similar to those here. There the plaintiff filed a civil action and moved for a preliminary injunction. Shortly before the hearing on the preliminary injunction, the defendant filed a motion to dismiss for failure to state a claim. At the preliminary injunction hearing the Court heard testimony from five witnesses and heard oral argument. Several weeks later the trial judge dismissed the complaint with prejudice, and made findings of fact and law. We noted that because the trial court considered matters outside the pleadings, the motion for summary judgment, and the hearing and notice requirements of Rule 12(b) and 56(c) must be adhered to. We reaffirmed the rule of *Enochs v. Sisson*, 5 Cir. 1962, 301 F.2d 125, where we held it an abuse of discretion to grant summary judgment without proper notice and hearing as required by Rule 56. Subsequent cases have reaffirmed our adherence to the strict notice and hearing requirements of Rules 12(b) and Rule 56 where the court sua sponte converts a 12(b)(6) motion into a summary judgment motion by considering matters outside the pleadings. See, e. g., *Davis v. Howard*, 5 Cir. 1977, 561 F.2d 565; *Sharlitt v. Gorinstein*, 5 Cir. 1976, 535 F.2d 282; *Scott v. Courtesy Inns, Inc.*, 5 Cir. 1973, 472 F.2d 562; *Gutierrez v. El Paso Community Action Program*, 5 Cir. 1972, 462 F.2d 121.

[2] Here the plaintiffs had no indication that a summary

judgment, a final judgment, might result from the preliminary injunction hearing. The first indication that the material produced for the hearing would be used to support a summary judgment was the Court's order of dismissal. Loss on a preliminary injunction motion may not mean a loss at the trial on the merits. Similarly, a motion to dismiss may result in a rejection of the pleadings, but it does not go to the merits of the case. Consequently, a summary judgment carries far greater impact than the matters explicitly before the court at the hearing.

[3] Appellants thus must have an opportunity to present additional material and arguments going to the issue of summary judgment. It may be that they have already provided everything they have, but as we observed in *Georgia Southern*, "When such a limited adjudication [the preliminary injunction] is the order of the day, we cannot say with assurance that the parties will present everything they have. The very intimation of mortality when summary judgment is at issue assures us that the motion will be rebutted with every factual and legal argument available." 373 F.2d at 498.

[4] In a later order, the District Court dismissed the fourth cause of action on the grounds that the court could not invalidate a facially neutral statute on the basis of improper motives in enacting the statute. The court thus refused to consider the intent behind the statute and dismissed the action. We find that the District Court misconstrued the plaintiffs' cause of action. Their challenge to § 182 was not solely on the basis of the motive behind the legislation; rather, it included an allegation of the section's discriminatory impact in fact. Such an allegation of both improper motive and discriminatory impact is in keeping with language in recent Supreme Court cases to the effect that a challenge to state action require a disproportionate racial impact and a showing of discriminary intent and purpose. See, e. g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

[5, 6] Appellees contend that there has been no showing of discriminatory impact, but the court's action came simply on a motion to dismiss. This cause of action was not a part of the preliminary injunction hearing. Thus the examination must be limited to whether the allegation, if supported by facts developed in later proceedings, states a claim upon which the plantiffs could recover. We find that it does. Of course, we express no view of the merits of plaintiffs' allegation.

The District Court's decision granting a summary judgment for defendants on plaintiffs' first three causes of action is vacated. The Court's dismissal of the fourth cause of action is reversed and the case is remanded for further proceedings consistent with this opinion.

VACATED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX C

Opinion Below

DECISIONS WITHOUT PUBLISHED OPINIONS

Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (if reported)
†LaCross v. Craighead	79-1737	7/17/80	AFFIRMED***	E.D.La.
*†Marshall v. Local Lodge No. 875, Brotherhood Railway Carmen of U. S. and Canada, AFL-CIO	79-3211	7/15/80	AFFIRMED	S.D.Miss.
Mize v. First National Bank of Jackson	77-1199	7/18/80	REVERSED AND REMANDED***	S.D.Miss.
*†Morrison v. New Orleans Public Service, Inc.	79-3745	7/16/80	AFFIRMED	E.D.La.
*Mosley v. Midfield Board of Education	79-3470	7/15/80	AFFIRMED	N.D.Ala.
*†Muckle v. Brown	79-2959	7/15/80	AFFIRMED	N.D.Ga.
*Owens v. U. S.	79-3009	7/ 7/80	AFFIRMED***	N.D.Fla., 474 F.Supp. 806
*†Rayon Y Celanese Peruana v. U. S.	79-2125	7/15/80	AFFIRMED	S.D.Ala.
*Roundrtee v. Eastern Air Lines, Inc.	80-5119	7/10/80	AFFIRMED***	S.D.Fla.
Rushing v. Louisiana & Arkansas Railway Co.	78-3172	7/17/80	REVERSED AND AFFIRMED***	E.D.La.
*†Schroeder v. Sherman	79-1991	7/15/80	AFFIRMED	E.D.La.
Underwood v. Hunter	80-7084	7/15/80	AFFIRMED***	N.D.Ala.
*U. S. v. Clayton	80-1112	7/17/80	AFFIRMED***	W.D.Tex.
*U. S. v. Coney	79-4068	7/ 9/80	AFFIRMED***	N.D.Miss.
*U. S. v. Dearing	79-3599	7/10/80	APPEAL DISMISSED***	W.D.Tex.
*†U. S. v. Diaz	79-5637	7/ 1/80	AFFIRMED	W.D.Tex.
*U. S. v. Fitzgerald	79-2208	7/17/80	AFFIRMED***	S.D.Tex.
*†U. S. v. Grote	79-5279	7/14/80	AFFIRMED***	W.D.Tex.
*U. S. v. Higgins	79-5263	7/10/80	AFFIRMED	N.D.Fla.
*U. S. v. Hiroms	80-1074	7/18/80	VACATED AND AFFIRMED***	S.D.Tex.
*U. S. v. Ledesma	79-1682	7/18/80	AFFIRMED***	W.D.Tex.
U. S. v. McGovern	78-5726	7/15/80	AFFIRMED***	M.D.Fla.
*U. S. v. Malcom	79-5580	7/ 1/80	AFFIRMED***	E.D.Tex.
†U. S. v. Maldonado	79-5262	7/17/80	AFFIRMED***	W.D.Tex.
†U. S. v. Namisnak	79-5496	7/10/80	AFFIRMED	S.D.Fla.
*†U. S. v. Price	79-5664	7/ 1/80	AFFIRMED	N.D.Ga.
*†U. S. v. Robinson	79-5441	7/ 1/80	AFFIRMED	E.D.La.
U. S. v. Smythe	79-5356	7/14/80	REVERSED AND REMANDED***	S.D.Tex.
*U. S. v. St. Germain	79-5662	7/18/80	AFFIRMED***	W.D.La.
*†U. S. v. Tamez	79-5202	7/ 1/80	AFFIRMED	N.D.Tex.

DECISIONS WITHOUT PUBLISHED OPINIONS—Continued

Title	Docket Number	Date of Decision	Disposition	Appeal from and Citation (if reported)
*U. S. v. Wallace	80-5114	7/18/80	AFFIRMED***	S.D.Fla.
*Wade v. Oliver	79-3775	7/ 7/80	AFFIRMED***	N.D.Ala.

*Fed.R.App.P. 34(a); 5th Cir.R. 18.
***Opinion contains citation(s) or special notations.
†Local Rule 21 case; see NLRB v. Amalgamated Clothing Works of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX D

Opinion Below

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and others similarly sit.	)	
Plaintiffs	)	
- v -	)	C.A. 78-M-0704
NELL HUNTER, JOSEPH J. TRUCKS, ind. and as members of the Board of Registrars of Jefferson County, and THOMAS A. JERNIGAN, CLARICE B. ALLEN, CLEO F. CHAMBERS, ind. and as members of the Board of Registrars of Montgomery County, on behalf of all other members of Boards of Registrars in the State of Alabama	)	
Defendants	)	

ORDER

This action is before the court on motion of defendants for summary judgment regarding counts one, two and three of the complaint and on motion of plaintiffs for certification of classes.

Counts one, two and three were dismissed by order of this court dated August 11, 1978. Subsequently, the Fifth Cir-

cuit vacated this order because the notice and hearing rements were not met when the motion to dismiss was converted into a motion for summary judgment without giving the plaintiffs the requisite ten-day notice.

Having once again reviewed these counts, the court's opinion regarding them remains unchanged from that stated in its memorandum opinion of August 11, 1978. Therefore, counts one, two and three are dismissed with the above noted memorandum opinion, as it pertains to these counts, being incorporated herein.

The remaining count in this action, count four, in substance asserts that Article VIII, § 182, of the Alabama Constitution (1901) abridges the right to vote on the basis of race in violation of the first, fifth, thirteenth, fourteenth and fifteenth amendments and 42 U.S.C. §§ 1981 and 1983. Although the court dismissed this count by order dated February 5, 1979, the ruling was vacated for further proceedings by the Fifth Circuit.

Accordingly, plaintiffs' motion for certification of classes is considered in regard to this count only. Having considered the materials submitted regarding this motion, it is the court's opinion it is due to be granted. The court is satisfied that the requirements of Fed. R. Civ. P. 23(a) and (b)(2) have been met with regard both to plaintiff and defendant classes. Therefore, the action may be maintained by plaintiffs as a class action on behalf of all similarly situated persons who have been purged from the voting rolls or barred from registering to vote within the State of Alabama solely because of their commission of a crime not punishable by imprisonment in a state penitentiary. *See, Ferguson v. Williams,* 330 F.Supp. 1012 (N.D. Miss. 1971); vacated on other grounds, 405 U.S. 1036 (1972), 92 S.Ct. 1322.

Further, the suit may be maintained against the defendants as a class representing all members of the sixty-seven county boards of registrars in the State of Alabama.

Done this 17th day of April, 1980.

/s/ FRANK H. McFADDEN

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
- v -	)	C.A. 78-M-704
NELL HUNTER, JOSEPH J. TRUCKS, individually and as members of the Board of Registrars of Jefferson County, and THOMAS A. JERNIGAN, CLARICE B. ALLEN, CLEO F. CHAMBERS, individually and as members of the Board of Registrars of Montgomery County, on behalf of all other members of Boards of Registrars in the State of Alabama	)	
Defendants	)	

ORDER

This cause came on to be heard on plaintiffs' motion for preliminary injunction and on defendants' motion to dismiss and motion for stay of discovery. Subsequent to the hearing on the preliminary injunction, and in accord with discussions during the hearing, plaintiffs filed a motion for admission of additional exhibits. In conformity with the memorandum opinion issued contemporaneously herewith, the court is of the opinion that the motion for preliminary injunction

should be overruled, the motion for stay of discovery should be granted. The motion to dismiss should be granted in part and held in abeyance in part, and plaintiffs' motion for admission of additional exhibits should be granted.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that plaintiffs' motion for preliminary injunction is overruled.

It is further ORDERED that defendants' motion to dismiss is granted in part and causes of action numbered I, II and III are dismissed.

It is further ORDERED that defendants' motion for stay of discovery is granted.

It is further ORDERED that plaintiffs' motion for admission of additional exhibits is granted.

The ruling on the motion to dismiss as to the fourth cause of action is held in abeyance pending further briefs. Any such briefs should be submitted within twenty (20) days of the date of this order.

Done this 11th day of August, 1978.

/s/ FRANK H. MCFADDEN

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
- v -	)	C.A. 78-M-704
NELL HUNTER, JOSEPH J. TRUCKS, individually and as members of the Board of Registrars of Jefferson County, and THOMAS A. JERNIGAN, CLARICE B. ALLEN, CLEO F. CHAMBERS, individually and as members of the Board of Registrars of Montgomery County, on behalf of all other members of Boards of Registrars in the State of Alabama	)	
Defendants	)	

MEMORANDUM OPINION

The two named plaintiffs, one black and one white, seek a declaratory judgment that Article VIII, § 182 of the Alabama Constitution (1901) violates the first, fifth, thirteenth, fourteenth and fifteenth amendments of the Constitution of the United States to the extent that it disqualifies persons convicted of certain offenses from voting. Claims are also made under 42 U.S.C. §§ 1971, 1973, 1981 and 1983. Juris-

diction is posited under 28 U.S.C. §§ 1331(a), 1343(3) and (4), and 2201.

Plaintiffs' complaint is in four counts, which in substance assert:

(1) The disenfranchising misdemeanor and minor felony convictions listed in section 182 unconstitutionally impinge upon the franchise because they deny the franchise without a compelling state interest and the section consequently violates the first, fifth, and fourteenth amendments to the United States Constitution.

(2) The same disenfranchising offenses are a denial of equal protection under the fourteenth amendment.

(3) The term "crime involving moral turpitude" is vague and indefinite and disenfranchisement for conviction of such crimes violates the first, fifth and fourteenth amendments.

(4) Section 182 abridges the right to vote on the basis of race in violation of the first, fifth, thirteenth, fourteenth and fifteenth amendments and 42 U.S.C. §§ 1981 and 1983.

This cause came on to be heard on July 19, 1978 on plaintiffs' motion for preliminary injunction, defendants' motion for stay of discovery and defendants' motion to dismiss. Since the time of the hearing, plaintiffs have filed a motion for admission of additional exhibits. Defendants deny the standing of plaintiffs to bring the suit, assert that the challenged section is constitutional, that plaintiffs have failed to state a claim on which relief can be granted and that plaintiffs have failed to exhaust state remedies. This memorandum opinion is in lieu of findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Article VIII, § 182 of the Alabama Constitution (hereinafter section 182), provides:

> The following persons shall be disqualified both from registering, and from voting, namely:

> All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude . . . .

Substantially the same provision is found in section 17-3-3 of the Alabama Code (1975).

Plaintiffs do not challenge that portion which provides for disenfranchisement for conviction of any crime punishable by imprisonment in the penitentiary, *i.e.* more than one year. The attack is on the other enumerated crimes and crimes involving moral turpitude. All of the nonfelony crimes enumerated which are now viable are crimes involving moral turpitude. [The non-viable exceptions are: (1) assault and battery on the wife, found unconstitutional in *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977); (2) living in adultery—a felony only after three convictions; (3) miscegenation—no longer punishable.] It is plaintiffs' contention that since some crimes which are not felonies and which do not involve moral turpitude are not disenfranchising, then no crime which is not a felony can be.

The motion for preliminary injunction seeks immediate determination of both plaintiff and defendant classes and injunctive relief, requiring the defendants to send certificates of registration to persons purged from the voting list because of section 182, and to publicize that they will register those who have heretofore been prohibited from voting by section 182. The sought-for plaintiff-class consists of "all persons disqualified from being registered or voting by operation of [section 182]." The purported defendant-class is

to include members of the Boards of Registrars of Alabama. The motion for preliminary injunction is premised on the first three causes of action, but not the fourth.

The facts are simple. Plaintiff Carmen Edwards was convicted of issuing a worthless check in March of 1978. On April 28, 1978, she tried to register to vote in Montgomery County and was told that she must be pardoned before she could register to vote. Plaintiff applied for a pardon and was informed by a letter from the Mayor's office that she could apply for a pardon next year, the year after her conviction. Plaintiff is now 21 years old and had never tried to register to vote prior to April 28, 1978. Plaintiff Victor G. Underwood was registered to vote soon after reaching the age of 21; he is now 27. He was convicted on a charge of issuing a worthless check "approximately 2 to 2½ years ago." By letter dated April 25, 1977, plaintiff was purged from the Jefferson County voter list. Plaintiff called the Jefferson County Board of Registrars to ask why he had been disenfranchised and was given information on how to get a pardon. Plaintiff has taken no steps other than filing this lawsuit on June 21, 1978 toward seeking a pardon or reinstating his right to vote. Both plaintiffs are qualified to vote in other particulars except for their convictions on the charge of issuing a worthless check. Defendants initially challenge the standing of the plaintiffs to bring this action. The court is of the opinion that this requires little comment. Plaintiffs were disenfranchised under the provisions of the section in question and in the court's view may challenge its constitutionality. Defendants then contend that the section is clearly constitutional and the complaint is due to be dismissed for failure to state a claim on which relief can be granted.

There is no doubt that a state may deny the franchise to felons. In *Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655 (1974), the court held that California could constitutionally exclude ex-felons from the vote. The court found "affirmative sanction" in the second section of the fourteenth amend-

ment. That section forbids the denial of the right to vote "except for participation in rebellion, *or other crime*." U.S. Const. amend. XIV, § 2 (emphasis supplied). *Ramirez*, as strictly limited, would not apply to any situation but that one within the narrow holding. Although some of the discussion of the legislative history of the second section of the fourteenth amendment speaks specifically of felonies known at common law, the actual language of the section speaks only of "any crime," and the court is of the opinion that *Ramirez* may be properly applied to cases involving crimes other than felonies. *Ramirez* cited with approval two cases approving exclusion of bigamists and polygamists from the franchise. 418 U.S. at 53, 94 S. Ct. at 2670, citing *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299 (1890); *Murphy v. Ramsey*, 114 U.S. 15, 5 S. Ct. 747 (1885). *Ramirez* also quoted the following language from a case allowing a literacy requirement for voting: "Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." 418 U.S. at 53, 94 S. Ct. at 2670, quoting *Lassiter v. North Hampton County Board of Elections*, 360 U.S. 45, 51, 79 S. Ct. 985, 990 (1959) (citations omitted).

Defendants primarily rely on two cases. The one most nearly in point is *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971). Plaintiff there challenged the constitutionality of a provision disenfranchising those convicted of treason against the state, of embezzlement of public funds, of malfeasance in office, of bribery or larceny, or of any crime involving moral turpitude, punishable by imprisonment in the penitentiary. The Georgia provision is dissimilar to the Alabama one. Although plaintiff's crime was a felony and a crime involving moral turpitude, she was disenfranchised not simply because she committed a felony, but because it involved moral turpitude. In other words, not all felonies were disenfranchising crimes. Plaintiffs contend that the only

issue in *Kronlund* was whether "a state may constitionally disenfranchise otherwise qualified voters because they have been convicted of a felony" (327 F. Supp. at 73) and therefore has no application. The court does not agree with plaintiffs' thesis. The following language shows that the court was concerned not specifically with a felony, but with the type of crime involved:

> A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims. For this reason, a State may prohibit idiots and insane persons, as well as, those convicted of certain offenses from participating in her elections. A State may also legitimately be concerned that persons convicted of certain types of crimes may have a greater tendency to commit election offenses. Therefore, Georgia has a compelling state interest sufficient to justify the voting restrictions set forth in § 2-801 of the Georgia Constitution. Since the State does have this legitimate interest to protect, this provision does not unjustifiably abridge the plaintiff's First Amendment rights.

327 F. Supp. at 73.

Defendants also rely on *Waddy v. Davis*, 445 F.2d 1 (5th Cir. 1971). In *Waddy*, plaintiffs were removed from the voting list pursuant to guilty pleas. Plaintiffs alleged that they were not represented by counsel nor advised that they would be removed from the voting list at the time they made their pleas. In *Waddy*, plaintiffs did not question the fact that the crime (receiving unemployment benefits by reason of misrepresentation) would disqualify them from voting. Plaintiffs did not directly attack the plea but theorized that their lack of information should erase the results of the guilty plea. The court held that the plaintiffs were in reality attacking their convictions and that the condition must be the focal point of the suit. Because the disenfranchising provision was not challenged, the court is of the opinion that *Waddy v. Davis* is not relevant.

This court is further guided here by a very recent case, *Shepherd v. Trevino*, 575 F.2d 110 (5th Cir. 1978). The issue there concerned reenfranchisement provisions under a statute disenfranchising convicted felons. Plaintiffs alleged an equal protection violation under 42 U.S.C. § 1983. The alleged violation occurred because of a disparity in the means of reenfranchisement between state and federal felons; the court affirmed the dismissal of the action for the failure to state a claim. The court refused to require strict scrutiny but did require a rational relationship to the achieving of a legitimate state interest.

Although both *Ramirez* and *Shepherd* dealt specifically with felonies, the court is of the opinion that this does not preclude the application of those cases to this one. Accordingly, the disenfranchisement scheme here, based on nonfelony convictions, like a similar scheme based on felony convictions, is valid so long as the rational relationship test is met. The court therefore rejects the equal protection argument of the plaintiffs and finds that the defendants have a sufficient state interest in withholding the vote from those criminals who commit crimes involving moral turpitude. state has an interest in excluding those who would have a greater tendency to violate Alabama's criminal laws, particularly where crimes which involve moral turpitude are concerned. The court is of the opinion that this section of the Alabama Constitution does not violate the federal Constitution and that the rational relationship test has been met.

Where federal question jurisdiction is involved, the test for dismissal is rigorous. Dismissal is not warranted if a complaint alleges the existence of a federal question, unless the claim is frivolous or foreclosed by prior decisions of the Supreme Court. *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773 (1946). See also *Hilgeman v. National Ins. Co. of America*, 547 F.2d 298 (5th Cir. 1977). The court is of the opinion that with respect to the first three causes of action, the test for dismissal has been met; and plaintiffs have failed to state

a claim on the first three causes of action. However, the court heard the motion to dismiss along with the application for a preliminary injunction and was presented evidence outside the pleadings. The court is further of the opinion that if the motion to dismiss is treated as a motion for summary judgment under Rule 56, it is due to be granted with respect to the first three causes of action.

The fourth cause of action alleges that the section was enacted with a racial animus and that it abridges the right to vote on the basis of race. Facially it is color-blind, but the court is of the opinion that the matter should not be dealt with on a Rule 12(b) motion to dismiss, at least until the parties have had time to brief the question. Accordingly, the ruling on that motion will be held in abeyance pending further briefing.

The preliminary injunction was premised on the first three causes of action and since they will be dismissed, the issue is not reached, nor is it necessary at this time to discuss any class action aspects of the case as it now stands. However, even if the first three causes of action did state claims, there has been no showing here which would entitle plaintiffs to a preliminary injunction.

In order to be entitled to a preliminary injunction, plaintiffs must establish four prerequisites: that there is a substantial likelihood that the movant will ultimately prevail on the merits, that the movant will suffer irreparable injury unless the injunction is issued, that the threatened injury to the movant outweighs the damage the injunction might cause the opponent; and that the injunction would not be adverse to the public interest. *E.g., Compact Van Equipment Co., Inc. v. Leggett & Platt, Inc.*, 566 F.2d 952 (5th Cir. 1978). Obviously, the court is of the view that the first prerequisite is not present. Moreover, the court is of the opinion that there has been no showing of irreparable harm. Concededly, the plaintiffs will be denied the right to vote in the forthcoming election under the law. This is not of suffi-

cient magnitude to cause the court to enjoin the application of the existing law. Whatever the harm to plaintiffs, the court is satisfied that the harm to the public if the injunction issued would be greater than any harm to the plaintiffs if it does not.

Defendants' contention that plaintiffs did not exhaust their state remedies must be considered in light of the motion to dismiss as it applies to the fourth cause of action. Although that fact is true, the court is of the opinion that exhaustion is not required here. As *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971), cited by defendants, states, there is no exhaustion requirement in a case such as this. The statement made in *Waddy v. Davis*, 445 F.2d 1 (5th Cir. 1971), requiring exhaustion is not pertinent. There, unlike here, the attack was on the conviction and its results. Here, the attack is on the statute. There is simply no basis for requiring an exhaustion of state remedies here.

In accordance with the foregoing commentary, the court is of the opinion that the motion for preliminary injunction should be overruled, and that the motion to dismiss should be granted in part and the ruling on the remainder of the motion held in abeyance. Plaintiffs' motion for admission of additional exhibits should be granted, although that evidence makes no difference in the court's decision. Defendants' motion for stay of discovery is due to be granted until the court has finally ruled on the motion to dismiss the fourth cause of action.

/s/ FRANK H. MCFADDEN
Chief Judge

August 11, 1978.

APPENDIX E

Opinion Below

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
- v -	)	CV 78-M-704
NELL HUNTER, et al.	)	
Defendants	)	

ORDER

In accordance with the memorandum opinion entered contemporaneously, it is ORDERED, ADJUDGED and DECREED that judgment be, and hereby is, granted in favor of defendants and that the complaint be, and hereby is, dismissed.

Costs are taxed to plaintiffs.

Done this 23rd day of December, 1981.

/s/ FRANK H. MCFADDEN
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VICTOR UNDERWOOD and CARMEN EDWARDS, for themselves and all others similarly situated	)	
Plaintiffs	)	
- v -	)	CV 78-M-704
NELL HUNTER, et al.	)	
Defendants	)	

MEMORANDUM OPINION

Plaintiffs seek to strike down part of section 182 of the Alabama constitution of 1901 which denies the franchise for conviction of crimes involving moral turpitude. A hearing on the merits has been held. This opinion is entered in lieu of findings of fact and conclusions of law under Rule 52(a), Fed. R. Civ. P.

The plaintiffs, Victor Underwood and Carmen Edwards, have been convicted of writing bad checks, and have been disenfranchised by the operation of § 182. Carmen Edwards, a black, alleges that the provision, though neutral on its face, is a classification by race which is unconstitutional under the fourteenth amendment. Both Edwards and Underwood, a white, allege that the provision violates a part of the Reconstruction Acts which they argue places a limit upon Alabama's ability to regulate its elections.

The plaintiffs' argument based upon the Reconstruction Acts is that the statute which purported to readmit Alabama did so on condition that the State's constitution not be

amended to disenfranchise the State's citizens other than for felonies. Ch. 70, 15 Stat. 73 (1866). The statute also approved the provisions of the State's then existing constitution. Defendants contend that this Act of Congress is unconstitutional under the tenth and fourteenth amendments. It is not necessary to reach this issue since the Alabama Constitution does not contravene the Act.

Alabama's Constitution of 1819 and 1867 disenfranchised those "convicted of bribery, perjury, forgery, or other high crimes or misdemeanors." Alabama Const. of 1819, Article VI § 5; Alabama Const. of 1867, Article VIII § 1. The term misdemeanors in the phrase "high crimes or misdemeanors" is not used in its present ordinary sense. According to Blackstone, in this context the word means crimes violating the public trust. Blackstone's Commentaries, Book IV, Ch. IX. English lawyers of Blackstone's time saw the list of crimes as limited to those violating the King's prerogative. While arguably the list of "high crimes and misdemeanors" did not include crimes of moral turpitude to English lawyers, the inclusion of forgery in Alabama's list of disenfranchising crimes indicates a broader meaning. Forgery involves moral turpitude, and was not a crime against the King's prerogatives or in violation of a public trust. Misdemeanors would therefore include crimes of moral turpitude such as the plaintiffs committed. This provision having been approved by the act of Congress, the 1901 constitution, if it goes beyond the readmission statute's limits, does not do so as to these plaintiffs. Their claim under the readmission statute fails.

Only one plaintiff asserts a claim based upon the fourteenth amendment. Carmen Edwards grounds her argument of unconstitutionality upon the legislative history of the 1901 constitution. To understand this, one must understand something of the background of the convention that wrote the constitution. After the major upheavals of reconstruction had subsided, and to a great extent in response to the perceived threat of a so-called force bill which would have

brought federal intervention in state elections, the states of the confederacy began to hold constitutional conventions, beginning with Mississippi in 1890. A major purpose of these conventions was to disenfranchise blacks. Woodward, *The Origins of the New South*, at 321 (1951). However, these conventions also occurred in the wake of a general populist revolt, and so another concern of these conventions was that whites, on sectional and class grounds, would vote. *Ibid.* at 331. It is fairly clear, as the testimony of the defendant's expert witness, Dr. J. N. Thornton of the University of Michigan, bears out, that Alabama's constitution conformed to this pattern. The leading historian of Alabama's constitution has stated:

> The revision of suffrage was the cardinal reason for the assembling of the convention. . . . The convention had met to establish "white supremacy by law" and to overthrow the revolutionary methods of "force and fraud used in Alabama since Reconstruction [to curtail black voting power] lest representative government perish in Alabama."

MacMillan, Constitutional Development in Alabama, 1798-1901, 267-68 (repl. ed. 1978), quoting John Knox, the president of the Constitutional Convention.

At the convention, the debates over disenfranchisement centered upon provisions developed by other states and which have since been struck down as unconstitutional—the poll tax and the grandfather clause. In committee, a provision known as the "fighting grandfather clause" was developed. This clause was patterned after the grandfather clause, which was developed in Louisiana. Alabama's version, in § 780 of the constitution, allowed the franchise to those descended from veterans of the Revolutionary War, the War of 1812, the war with Mexico, the Civil War for the Confederacy, and the Spanish-American War. The bulk of the debate was on this clause. That portion of the debate concerning the section disenfranchising for crimes only treated the inclusion of violations of the vagrancy statute.

The committee report for the suffrage provisions states: "Our main purpose has been to remove the venal and incompetent from the exercise of the elective franchise and not to violate any provisions of the constitution of the United States." 1 Official Proceedings of the Constitution of the State of Alabama at 1257 (1901). The report goes on to say that the provisions are not intended to discriminate on the basis of race, color, or previous condition of servitude. The minority report from the committee argues that the fighting grandfather clause *is* unconstitutional as it *does* discriminate on the basis of race. *Ibid.* at 1264-1265.

The protestations of good intention on the part of the legislature are to be considered with skepticism. However, one point is clearly made. The State has a valid interest in denying the franchise to those convicted of violating its laws. Cf. *Richardson v. Raminez*, 418 U.S. 24 (1974). The legislative history expressly keyed the suffrage provisions to this interest. The expressions of concerns over unconstitutionality by those at the convention who doubted the constitutionality of the suffrage provisions lay elsewhere—on the fighting grandfather clause. There is simply nothing in the legislative history to lead one to decide that the provisions disenfranchising those convicted of crimes are based upon the racism present at the constitutional convention.

This case, where the plaintiffs allege impermissible motive in the face of a permissible one, is controlled by a principle of constitutional law that an impermissible legislative motive standing alone will not invalidate legislation for which there is a permissible basis. *Palmer v. Thompson*, 403 U.S. 217 (1971).

Palmer involved the desegregation of public facilities in Jackson, Mississippi. The city was ordered by a court to desegregate its swimming pools and responded by closing them. There was proof that the closing "was motivated by a desire to avoid integration of the races." *Palmer*, 403 U.S. at 224. The Court noted that no cases had invalidated legis-

lation because of the motives of the men who voted for it. The court held that the fourteenth and fifteenth amendment cases suggesting that motive is relevant involved motive combined with discriminatory impact, such as *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964). This has continued to be true of the Supreme Court's cases. Cases holding that proof of intent was an essential part of a § 1983 case also had clear records of discriminatory impact. Cf. *Washington v. Davis*, 426 U.S. 229 (1976).

Palmer also stands for the principle that, where legislation is equally justified for a bad motive (racism) or a good one (in *Palmer*, economics), the bad motive will not overturn the statute. This principle has been recognized by the Supreme Court as recently as last term when it refused to hold unconstitutional statutory rape laws. *Micheal M. v. Superior Court of Sonoma County*, ____ U.S. ____, 101 S.Ct. 1200 (1981). Justice Rehnquist wrote the plurality opinion in which the Chief Justice and Justices Powell and Stewart joined. Justice Blackmun joined in the result. The plurality opinion noted that one of the original justifications of such laws was "to protect the virtue and chastity of women." The Court noted that such a basis was unjustifiable because it rests on archaic stereotypes:

> The question for us—and the only question under the federal constitution—is whether the legislation violates the Equal Protection Clause of the Fourteenth Amendment and not whether its supporters may have done so for reasons no longer generally accepted. . . . "[I]t is a familiar principle of constitutional law that this Court will not strike down a statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

Micheal M, 101 S.Ct. 1206, n.7.

There is no basis for this court to credit any bad motive on the part of the legislature and yet to ignore the perfectly found motive grounded in the State's interests in governing

exercise of the franchise by those convicted of crimes. Furthermore, intent as to the provision involved here has not been proven. The claim under the fourteenth amendment also fails.

/s/ FRANK H. MCFADDEN
Chief Judge

December 23, 1981

APPENDIX F

Judgment

Victor UNDERWOOD and Carmen Edwards, for themselves and all others similarly situated, Plaintiffs-Appellants,

v.

Nell HUNTER, et al.,
Defendants-Appellees.

No. 82-7011.

United States Court of Appeals,
Eleventh Circuit.

April 10, 1984.

Plaintiffs who were barred from representation on election rolls filed suit against counties' boards of registrars under sections 1981 and 1983 challenging, as discriminatory, state constitutional section under which they were disfranchised. The United States District Court for the Northern District of Alabama, Frank H. McFadden, J., entered judgment in favor of plaintiffs on two of five causes of action, and plaintiffs appealed. The Court of Appeals, Vance, Circuit Judge, held that state constitutional section disfranching those convicted of, inter alia, crimes of moral turpitude violated the Fourteenth Amendment by denying plaintiffs' right to vote on basis of race.

Reversed and remanded with instructions.

1. Elections

A successful Fourteenth Amendment claim of race discrimination in matters affecting voting requires that plaintiffs establish an intent to abridge the franchise on account of race. U.S.C.A. Const. Amend. 14.

2. Constitutional Law

In a case alleging discrimination on basis of race, permissible motivating interest articulated by the state must be compelling, and means employed must be precisely drawn to accomplish exactly objective that state purports to further.

3. Federal Courts

On review, district court's findings of fact are entitled to be respected unless they are clearly erroneous.

4. Federal Courts

Under clearly-erroneous standard, lower court's findings of fact shall stand unless reviewing court is left with definite and firm impression that mistake has been made.

5. Federal Courts

Clearly-erroneous standard of review applies to findings of both subsidiary and ultimate fact.

6. Federal Courts

Questions of law are subject to independent review, and findings made under an erroneous review of law may be set aside on that basis.

7. Constitutional Law

Plaintiffs, who were barred from representation on election rolls pursuant to state constitutional section disfranchising those convicted of, inter alia, crimes of moral turpitude, met burden of showing that the section was specifically adopted with intent to disfranchise blacks on account of their race, and state failed to meet burden to demonstrate that the section would still have been adopted had a permissible state reason been the sole consideration; therefore, the section violated the Fourteenth Amendment by denying plaintiffs' right to vote on basis of race. U.S.C.A. Const. Amend. 14; Ala.Const. § 182.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

VANCE, Circuit Judge:

In 1977 and 1978 the boards of registrars for Montgomery and Jefferson Counties in Alabama barred Carmen Edwards and Victor Underwood, respectively, from representation on the election rolls. They were denied voting privileges under section 182 of the Alabama Constitution, adopted in 1901, which disfranchises those convicted of crimes punishable by imprisonment in the penitentiary, crimes of moral turpitude and other enumerated misdemeanors and felonies.[1] Edwards and Underwood were disfranchised for presenting worthless checks, a misdemeanor which the registrars classify as a crime of moral turpitude.[2]

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[1]Section 182 of the Alabama Constitution of 1901 provides:

> The following persons shall be disqualified both from registering, and from voting, namely:
>
> All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

[2]In determining whether an offense is a crime of moral turpitude, the registrars follow Alabama case law and, in the absence of judicial decision, opinions of the state attorney general. The registrars' actions in this case were based on opinions of the attorney general. In *Pippin v. State*, 197 Ala. 613, 74 So. 340 (1916), the Alabama Supreme Court defined a crime of moral turpitude as an act that is

Edwards and Underwood filed suit against the boards of registrars of Montgomery and Jefferson Counties under 42 U.S.C. §§ 1981 and 1983 challenging section 182 as it applies to those convicted of crimes not punishable by imprisonment in the penitentiary (nonprison offenses). They alleged five causes of action, one of which is dispositive. Plaintiffs alleged that the nonprison offenses warranting disfranchisement under section 182 were specifically adopted with the intent to disfranchise blacks on account of their race and that the provision has had exactly its intended effect.[3] They requested a declaration invalidating section 182 and sought

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" 'immoral itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude.' " *Id.* at 616, 73 So. at 342 (quoting *Fort v. City of Brinkley*, 87 Ark. 400, 112 S.W. 1084 (1908)). The attorney general in opinion has acknowledged that the classification of presently unaddressed offenses "will turn upon the moral standards of the judges who decide the question." Pl.Exh. 3; *see also infra* note 13. "Thus does the serpent of uncertainty crawl into the Eden of trial administration." McCormick, *McCormick on Evidence* § 43, at 85-86 (2d ed. 1972).

[3]Plaintiffs also alleged: (1) that the section denies the franchise to plaintiffs without a compelling state interest in contravention of the first, fifth and fourteenth amendments; (2) that the section denies plaintiffs equal protection of the laws because more serious crimes are not disabling; (3) that the term "crime involving moral turpitude" is unconstitutionally vague; and (4) that the suffrage provisions of the 1901 Alabama Constitution are stricter than those of the 1868 Constitution, in violation of the Act of Readmission, Act of June 25, 1868, ch. 70, 15 Stat. 73.

Before plaintiffs amended their complaint to add the Readmission Act claim, the district court granted summary judgment for the registrars on the first three causes and dismissed the race discrimination claim for failure to state a claim upon which relief could be granted. We reversed and remanded for further proceedings. *Underwood v. Hunter*, 604 F.2d 367 (5th Cir. 1979). During subsequent discovery plaintiffs moved for a preliminary injunction premised on the first three theories so that they could vote in the 1980 primaries and general election. We affirmed the order of the district court denying relief because we concluded that plaintiffs had not shown any prospect of irreparable harm. *Underwood v. Hunter*, 622 F.2d 1042 (5th Cir. 1980). After the first three claims were again dismissed by the trial court, the Readmission Act claim proceeded to trial with the race discrimination claim.

to enjoin its future application. With respect to the two claims proceeding to trial, the district court certified a plaintiff class of those disfranchised for nonprison offenses, represented by Underwood and Edwards,[4] and a defendant class of all Alabama county boards of registrars. Following trial in 1981, the district court issued a memorandum opinion ruling for defendants on these two causes of action. Plaintiffs filed this appeal challenging the disposition of all five claims. We hold that section 182 violates the fourteenth amendment because it denies plaintiffs the right to vote on the basis of race.[5]

[1, 2] A successful fourteenth amendment claim of race discrimination in matters affecting voting requires that plaintiffs establish an intent to abridge the franchise on account of race. *City of Mobile v. Bolden*, 446 U.S. 55, 66-67, 100 S.Ct. 1490, 1499-1500, 64 L.Ed.2d 47 (1980) (plurality opinion); *Washington v. Davis*, 426 U.S. 229, 240, 96 S.Ct. 2040, 2047-48, 48 L.Ed.2d 597 (1976). To establish a violation of the fourteenth amendment in the face of mixed motives, plaintiffs must prove by a preponderance of the evi-

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[4]Edwards is black and Underwood is white. From the record of the proceedings below it appears that for purposes of the race discrimination claim the trial court treated Edwards as the representative of a subclass of blacks disfranchised by virtue of conviction of nonprison offenses.

[5]The registrars argue that mootness and failure to exhaust administrative remedies bar us from reaching the merits. Exhaustion of administrative remedies, however, is not a prerequisite to the bringing of this action under 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). The charge of mootness lacks support. In 1980 the office of the state attorney general issued an opinion letter declaring that convictions under municipal ordinances would not warrant disfranchisement. Def.Exh. 2. The registrars argue on the basis of this directive that Edwards might now qualify for registration because worthless check writing is a violation of both city ordinance and state statute. They have adduced no proof that Edwards was convicted of a municipal offense alone and in the meantime they have not offered to reverse their original decision barring registration. We therefore discern nothing that in any way extinguishes Edwards' claim.

dence that racial discrimination was a substantial or motivating factor in the adoption of section 182. They shall then prevail unless the registrars prove by a preponderance of the evidence that the same decision would have resulted had the impermissible purpose not been considered. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 & n. 21, 97 S.Ct. 555, 566 & n. 21, 50 L.Ed.2d 450 (1977); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). In a case alleging discrimination on the basis of race, the permissible motivating interest articulated by the state must be compelling, *Crawford v. Board of Education*, 458 U.S. 527, 536, 102 S.Ct. 3211, 3217, 73 L.Ed.2d 948 (1982), and the means employed must be precisely drawn to accomplish exactly the objective that the state purports to further. *Kramer v. Union Free School District*, 395 U.S. 621, 632, 89 S.Ct. 1886, 1892, 23 L.Ed.2d 583 (1969).

The district court found that plaintiffs failed to show evidence of discriminatory purpose in the adoption of section 182. It next concluded that even if a racial animus was demonstrated, the state's purported interest in denying criminals the franchise is a permissible one.

[3-6] We cannot agree with the district court. Our review of the record reveals that the district court erred both in its factual findings and in its legal analysis.[6] We conclude that

[6]On review the district court's findings of fact are entitled to be respected unless they are clearly erroneous. *Hardin v. Stynchcomb*, 691 F.2d 1364, 1372 (11th Cir. 1982). Under the clearly erroneous standard, the lower court's findings of fact shall stand unless the reviewing court is left with the definite and firm impression that a mistake has been made. *American National Bank v. Federal Deposit Insurance Corp.*, 710 F.2d 1528, 1533-34 (11th Cir. 1983). This standard of review applies to findings of both subsidiary and ultimate fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983). Questions of law are subject to independent review, and findings made under an erroneous view of the law may

the district court's findings of lack of discriminatory intent in the adoption of section 182 is clearly erroneous. In addition, the district court failed to require the state to show that section 182 would have been enacted in the same form in the absence of racial animus, as *Arlington Heights* requires. By allowing the state to prevail on what the district court concluded was a showing of permissible intent, the court brought its inquiry to a premature end.[7]

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be set aside on that basis. *Pullman-Standard*, 456 U.S. at 287, 102 S.Ct. at 1789.

[7]The court held that plaintiffs would not have prevailed even if they had shown discrimination because the court discerned a permissible reason for restricting the franchise of criminals. Citing *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), and the plurality opinion in *Michael M. v. Superior Court*, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981), the district court ruled that "an impermissible motive standing alone will not invalidate legislation for which there is a permissible basis."

The lower court's reliance on *Michael M.* is misplaced. In *Michael M.*, Justice Rehnquist, writing for a plurality of the Court, quoted *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to the effect that the existence of an illicit legislative motive does not *automatically* result in a conclusion of unconstitutionality. 450 U.S. at 472 n. 7, 101 S.Ct. at 1205-06 n. 7. The plurality proceeded to cite the burden-shifting test announced in note 21 of *Arlington Heights*, signifying that discriminatory intent *will* defeat a statute where the state is unable to demonstrate that the same result would have occurred solely in light of a permissible motive.

We do not read *Palmer* to the contrary. In *Arlington Heights* the Court cited *Palmer* as supportfor the proposition that a plaintiff need not necessarily prove that racial discrimination was the sole motivating factor in order to prevail:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.[11]
>
> [11]In *McGinnis v. Royster*, 410 U.S. 263, 276-277, 93 S.Ct. 1055, 1063, 35 L.Ed.2d 282 (1973), in a somewhat different context, we observed: "The search for legislative purpose is often elusive enough, *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), without a requirement

Applying the *Arlington Heights* test to the case at hand, the first step is to inquire whether intent to deny the franchise on the basis of race was a substantial or motivating factor in the enactment of section 182. In conducting this inquiry we are mindful of the testimony by expert witnesses for both sides that the purpose of section 182 must be considered in light of the overall purpose of the 1901 constitutional convention and the suffrage article, taken as a whole.

Blacks first received the right to vote in Alabama under the Constitution of 1867, which created universal suffrage for males over the age of twenty-one with certain exceptions not relevant here. Ala. Const. of 1867, art. VII. With the end of Reconstruction, the white citizens of Alabama moved to reassert their once unquestioned political supremacy. The 1890's ushered in an era of disfranchisement not only in Alabama but throughout the South. In 1890 Mississippi adopted a new state constitution embodying the suffrage restrictions proposed in the "Second Mississippi Plan." By 1908 eleven other states, including Alabama, had followed suit through various statutory and constitutional devices. S. Hackney, *Populism to Progressivism in Alabama* 147 (1969); C. Woodward, *Origins of the New South 1877-1913* 321 (1971).

In the judgment of modern scholars, the organizers of the 1901 Alabama convention sought to disfranchise poor dissident whites as well as blacks. M. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics,*

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that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

429 U.S. at 265 & n. 11, 97 S.Ct. at 563 & n. 11. In light of this passage, we conclude that *Arlington Heights* supercedes any dicta which *Palmer* might contain to the effect that a permissible purpose will always defeat an impermissible motive. *See also Washington v. Davis*, 426 U.S. at 242-43, 96 S.Ct. at 2048-49 (*Palmer* "did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences"); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 Yale L.J. 328, 330 (1982).

the Negro, and Sectionalism 249, 269 (1955) (Def.Exh. 14). With the ascendency of the Populists a decade earlier, the black vote had acquired added leverage. Whites, Democrats and Populists alike, view for black ballots in any way they could, with favors, pardons of convictions, outright vote purchase and massive electoral fraud. *United States v. State of Alabama*, 252 F.Supp. 95, 98 (M.D.Ala.1966) (three-judge court); S. Hackney, *supra*, 36-37, 89, 176-77. As the court below noted, resort to such methods had become increasingly precarious in light of renewed Northern moves to extend the federal election supervisory act of 1870. In 1890 the Senate had narrowly defeated the Lodge force bill, which called for tighter federal control of all phases of voting, from voter registration to ballot tabulation. J. Kousser, *The Shaping of Southern Politics* 29-30 (1974); C. Woodward, *supra*, at 254-55. The most effective way to ward off federal intervention as well as fraud, according to the reformers, was to eliminate the Negro vote. S. Hackney, *supra*, at 146, 175-77; M. McMillan, *supra*, at 269; C. Woodward, *supra*, at 326-27. In the words of one delegate to the 1901 convention, "Now we are not begging for 'ballot reform' or anything of that sort, but we want to be relieved of purchasing the Negroes to carry elections. I want cheaper votes." Speech of Delegate William A. Handley, III *Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901* 2276-77 (1940) [hereinafter cited as *Official Proceedings*].

When the Alabama constitutional convention assembled in May 1901, the question was not whether to disfranchise the Negro but rather how to do so constitutionally. In his opening address John B. Knox, the president of the convention, declared:

> And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.

I *Official Proceedings* at 8; *see also Journal of the Proceed-*

ings of the Constitutional Convention of the State of Alabama 1776 (1901). In Knox' words, "if we would have white supremacy, we must establish it by law—not by force or fraud." I *Official Proceedings* at 9. Borrowing from the successful methods of the Second Mississippi Plan and those of other states,[8] the suffrage committee set about to achieve this objective by settling on devices that would subvert the guarantees of the fourteenth and fifteenth amendments without directly provoking a legal challenge. In hopes of success, the committee made resort to facially neutral "tests that took advantage of differing social conditions. Property tests, literacy tests, residence requirements, the poll tax, and disqualification for conviction of certain crimes all fell into this category." S. Hackney, *supra*, at 192; *see also* Deposition of J. Morgan Kousser (Pl.Exh. 9).[9] The result was an exceptionally byzantine suffrage scheme. S. Hackney, *supra*, at 193; M. McMillan, *supra*, at 359.[10]

[8]I *Official Proceedings* at 10-13; J. Kousser, *supra*, at 39-40, 189; M. McMillan, *supra*, at 272-75 (Pl.Exh. 12).

[9]In 1898 the Supreme Court held that the Second Mississippi Plan passed muster under the fourteenth amendment. *Williams v. Mississippi*, 170 U.S. 213, 18 S.Ct. 583, 42 L.Ed. 1012 (1898). The Mississippi provisions included a poll tax and a literacy test coupled with an understanding clause as a loophole for poor whites. *Id.* at 217 n. 1, 18 S.Ct. at 585 n. 1.

As the district court noted, the Alabama proposal that the delegates feared was most vulnerable to constitutional attack was the temporary fighting grandfather clause, section 180. Under that clause veterans and their descendants automatically qualified to register until January 1, 1903, when a permanent provision imposing literacy and property restrictions, section 181, took effect. The Supreme Court later confirmed the delegates' fears when it invalidated a similar Oklahoma grandfather clause. *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915). Adoption of facially neutral and severable measures such as section 182 was a critical line of defense in case other parts of the suffrage plan did not withstand attack. Deposition of J. Morgan Kousser.

[10]Under the permanent plan which took effect on January 1, 1903, Ala. Const. art. VIII, § 181, citizens had to satisfy requirements of sex, age, residence, literacy and gainful employment or property ownership before they could register. *Id.* §§ 177-178, 181. Registered voters further had to pay a cumulative poll tax of $1.50 per year

While there is scant record of the debates over section 182, the sources of the crimes selected for inclusion in and exclusion from section 182 shed light on the motives of its drafters. In enumerating the crimes that would trigger disfranchisement, the suffrage committee chose offenses that were "peculiar to the Negro's low economic and social status," such as petty property offenses, wife-beating and sex-related crimes. P. Lewinson, *Race, Class & Party* 81 & n. 7 (1963) (cited in Pl.Exh. 9); M. McMillan, *supra*, at 275 (Pl.Exh. 12). The crimes selected by the suffrage committee had their origin in an ordinance drafted and submitted by John Fielding Burns, a Black Belt planter. *See* I *Official Proceedings* at 511. According to Dr. McMillan:

> [t]he crimes [Burns] listed were those he had taken cognizance of for years in his justice of the peace court in the Burnsville district, where nearly all his cases involved Negroes. For example, among those [Burns would have] disfranchised were persons guilty of larceny, bigamy, seduction, incest, rape, or attempt to rape, burglary, or attempt to burglarize, vagrancy, wife beating, forgery and "those who are bastards or loafers or who may be infected with any loathsome or contagious disease."

M. McMillan, *supra*, at 275 n. 76. In newspaper accounts, "Burns estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes." J. Gross, *Alabama Politics and the Negro, 1874-1901* 244 (1969) (cited in Pl. Exh. 9).

According to experts for both sides, the evident racial animus of section 182 was used to induce delegates representing poor whites to vote for other provisions in the suffrage article, such as the poll tax, that were contrary to their interests. Whatever the folly of their vote, their perceptions of the disparate impact of section 182 turned out to be cor-

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before they could cast a ballot. *Id.* §§ 178, 194. A three-judge court struck down the Alabama poll tax as violative of the fifteenth amendment in *United States v. Alabama*, 252 F.Supp. 95 (M.D.Ala. 1966) (Rives, J.).

rect. The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses.[11]

[7] In reviewing this record we are left with a firm and definite impression of error by the court below with respect to the issue of intent. Plaintiffs have more than shouldered their burden of showing that discriminatory intent was a motivating factor in the adoption of section 182; they have presented evidence from which the district court was required to find as a matter of law that discriminatory intent motivated section 182.[12] We therefore turn to the state's burden to demonstrate that the section would still have been adopted had a permissible state reason been the sole consideration.

The registrars rely on a purported state interest in denying the franchise to those convicted of violating its laws. Assuming without deciding that this asserted state interest would pass constitutional muster, we are unable to discern any evidence that the rule was actually intended to serve that interest. *Scheinberg v. Smith*, 659 F.2d 476, 483 n. 2 (5th Cir. Unit B 1981).

In the first place, we note several glaring omissions from the nonprison offenses resulting in disfranchisement under

[11]Because the registrars have not raised the issue whether blacks commit nonprison offenses generally in similarly disproportionate numbers, we do not reach that question.

[12]In fact, the registrars concede the point in brief. They argue, however, that the first prong of *Arlington Heights* is not satisfied because the delegates also intended to deny suffrage to lower-class whites. This is an erroneous reading of the law. Under *Arlington Heights* plaintiffs need only show that racially discriminatory intent was *a* motivating factor behind the challenged legislation. Without question that was done here. The registrars do not advance the denial of the franchise to poor whites as a permissible purpose under the second prong of *Arlington Heights*.

section 182.[13] While underinclusiveness in and of itself does not establish a discriminatory intent, once such intent is shown, underinclusiveness is relevant to whether a second, permissible purpose also motivated the drafters. Had the convention truly wished to vindicate a "good government" purpose, it would have included all crimes not punishable by imprisonment in the penitentiary. *Compare Trimble v. Gordon*, 430 U.S. 762, 768 n. 13, 97 S.Ct. 1459, 1464 n. 13, 52 L.Ed.2d 31 (1977); *O'Brien v. Skinner*, 414 U.S. 524, 530, 94 S.Ct. 740, 743, 38 L.Ed.2d 702 (1974). Nothing in the convention proceedings or the constitution itself suggests a good government purpose. *See Trimble*, 430 U.S. at 768 & n. 13, 97 S.Ct. at 1464 n. 13; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 641 n. 9, 94 S.Ct. 791, 797 n. 9, 39 L.Ed.2d 52 (1974); L. Tribe, *American Constitutional Law* § 12-8, at 602 & n. 1; *id.* § 16-30, at 1085-88 (1978). Indeed, while it is true that the avowed objective of the suffrage committee was to deny the vote to the corrupt and the ignorant, *see* I *Official Proceedings* at 1257, defendants' expert freely admitted under cross-examination that the phrase the "corrupt and the ignorant" referred specifically to blacks and lower-class whites. The same good government rationale, presented in defense of the Alabama poll tax, a sister provision to section 182, struck the late Judge Rives as nothing more than "ingenious after-thought." *United States v. Alabama*, 252 F.Supp. at 101. We hasten to agree and conclude that the registrars as a matter of law failed to present any

[13]In 1975, the year in which Underwood committed the offense for which he was convicted, nonprison offenses that were neither enumerated in section 182 nor involved moral turpitude and that thus were free from disability included: second-degree manslaughter (carrying a maximum sentence of 12 months and a maximum fine of $500); assault on a police officer (12 months; $1000); assault and battery (6 months; $500); mailing pornography (12 months; $2000); and aiding the escape of a misdemeanant (12 months; $1000). By contrast, Underwood, who was convicted for issuing a worthless $77.41 check, risked a maximum penalty of a $100 fine for a first offense. For repeated offenses, the most serious punishment authorized was a sentence of three months and a fine of $400.

evidence whatsoever of permissible intent. There was no evidence from which the district court could have found that section 182 would have been adopted had a permissible reason been the sole consideration.[14]

We recognize the registrars' good faith in administering the statute without reference to race. Neither their impartiality nor the passage of time, however, can render immune a purposefully discriminatory scheme whose invidious effects still reverberate today.

We hold that section 182 of the Alabama Constitution of 1901 violates on account of race the fourteenth amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary. Since those provisions of section 182 that disfranchise nonprison offenders lack legal effect, *Dorchy v. Kansas*, 264 U.S. 286, 289-90, 44 S.Ct. 323, 324, 68 L.Ed. 686 (1924); *see INS v. Chadha*, ____ U.S. ____, 103 S.Ct. 2764, 2775, 77 L.Ed.2d 317 (1983) (citing

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[14]As evidence to the contrary, the state points to *Washington v. State*, 75 Ala. 582 (1884). In that case the Alabama Supreme Court announced in a racially neutral context that the state had the right to preserve the integrity of the vote by disfranchising those who had been convicted of crimes involving moral turpitude. *Id.* at 585. Before this court defendants argue that the holding of that case must have been the motivating force behind section 182 since most of the delegates to the 1901 convention were lawyers and presumably were aware of it. We agree with plaintiffs that this is too attenuated a causal link to prove that section 182, which swept in certain enumerated misdemeanors as well as crimes of moral turpitude, would have appeared in the same form absent racial motive. The decision preceded the convention by seventeen years. Significantly, defendants point to no passage in the proceedings or in the committee report accompanying section 182 that invoked *Washington v. State* as authority for the suffrage provision. As we admonished in *Scheinberg*, 659 F.2d at 483 n. 2, it is improper for us to speculate as to any permissible state purposes that might exist when fundamental rights or the rights of a suspect class are at stake. For the same reason, we cannot give credence to the state's argument that the 1901 expansion of the disabling crimes listed in the 1875 Alabama Constitution demonstrates an affirmation of what the state assumes was the good government purpose of the Redemption-era provision.

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234, 52 S.Ct. 559, 564-65, 76 L.Ed. 1062 (1932)), we do not reach the additional claims that plaintiffs press. The district court shall issue an injunction ordering voter registration upon request by members of plaintiff class who qualify in all other respects for registration on the electoral rolls.

REVERSED and REMANDED with instructions.

APPENDIX G

Notice Of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VICTOR UNDERWOOD AND CARMEN EDWARDS, for themselves and all others similarly situated,	)	
Plaintiffs-Appellants,	)	
V	)	NO. 82-7011
NELL HUNTER, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama,	)	
Defendants-Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Nell Hunter, et al, the defendants-appellees above named, hereby appeal to the Supreme Court of the United States from a final judgment holding that section 182 of the Alabama Constitution of 1901 violates on account of race the Fourteenth Amendment with respect to those convicted of crimes not punishable by imprisonment in the penitentiary entered in this action on April 10, 1984.

This appeal is taken pursuant to Title 28, USC, §1254(2). Dated July 2, 1984.

/s/ JAMES S. WARD

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

COUNSEL

WARD & MCKNIGHT
2100-16th Avenue South
Suite 302
Birmingham, Alabama 35205
(205) 933-7000

CERTIFICATE OF SERVICE

I, James S. Ward, a member of the Bar of The Supreme Court of the United States and counsel of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, appellants herein, hereby certify that on July 2, 1984, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, on each of the parties herein as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On The Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, DC 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General, and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, DC 20530.

On James E. Vandegrift, Clerk of the United States District Court, Northern District of Alabama, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed

to the post office address of James E. Vandegrift, Clerk of the United States District Court, Northern District of Alabama, Federal Courthouse, 1800-5th Avenue North, Birmingham, Alabama 35203.

All parties required to be served have been served. Dated July 2, 1984.

/s/ JAMES S. WARD

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

COUNSEL

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Suite 302
Birmingham, Alabama 35205
(205) 933-7000

AFFIDAVIT OF SERVICE

I, James S. Ward, depose and say that I am an attorney in the law firm of Ward & McKnight and I am the attorney of record for Nell Hunter, et al, individually and on behalf of all other members of Board of Registrars in the State of Alabama, the appellants herein, and that on the 2nd day of July, 1984, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein, as follows:

On Victor Underwood and Carmen Edwards, for themselves and all others similarly situated, appellees herein, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of Edward Still and Neil Bradley, the above named appellees counsel of record, at Edward Still, Suite 400, Commerce Center, 2027 First Avenue North, Birmingham, Alabama 35203 and Neil Bradley, ACLU Foundation, 52 Fairlie Street NW, Atlanta, Georgia 30303.

On The Solicitor General, Department of Justice, by depositing such copies in the United States Post Office, Birmingham, Alabama, with first class postage prepaid, properly addressed to the post office address of The Solicitor General, Department of Justice, Washington, DC 20530.

On William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General, and Brian K. Landsberg, Esquire, by depositing such copies in the United States Post Office, Birmingham, Alabama with first class postage prepaid, properly addressed to the post office address of William Bradford Reynolds, Assistant Attorney General, Charles J. Cooper, Deputy Assistant Attorney General and Brian K. Landsberg, Esquire, United States Department of Justice, Washington, DC 20530.

On James E. Vandegrift, Clerk of the United States District Court, Northern District of Alabama, by depositing such copies in the United States Post Office, Birmingham,

Alabama, with first class postage prepaid, properly addressed to the post office address of James E. Vandegrift, Clerk of the United States District Court, Northern District of Alabama, Federal Courthouse, 1800-5th Avenue North, Birmingham, Alabama 35203.

All parties required to be served have been served.

/s/ JAMES S. WARD

James S. Ward
Special Assistant Attorney General
Attorney for Appellants

Sworn to and subscribed before
me this the 2nd day of July, 1984.

/s/ EDITH R. LEBERTE

Notary